No. 7981

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

STANDARD PACKING COMPANY, a corporation,

Appellant,

v.

NAT ROGAN, individually and as Collector of Internal Revenue for the Sixth District of California,

Appellee.

Appeal from the District Court of the United States of America, in and for the Southern District of California, Central Division

BRIEF FOR THE APPELLEE

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STANDARD PACKING COMPANY, a corporation,
Appellant,

v.

NAT ROGAN, individually and as Collector of Internal Revenue for the Sixth District of California,
Appellee.

BRIEF FOR THE APPELLEE

Opinions Below

The only previous opinions in the present case are those of the District Court of the United States for the Southern District of California, Central Division, rendered July 27, 1935 (R. 76), entered upon the granting of appellant's application for preliminary injunction herein, and the opinion of said court rendered August 30, 1935 (R. 90), upon granting appellee's motion to vacate said preliminary injunction, neither of which opinions has yet been reported.

Jurisdiction

This appeal involves excise taxes imposed by the Agricultural Adjustment Act, as amended, upon the process-

ing of hogs, and is taken from an interlocutory order and decree of the District Court granting appellee's motion to vacate the preliminary injunction which was entered August 30, 1935. (R. 90-91.) The appeal is brought to this Court by petition for appeal on behalf of the appellant filed September 14, 1935 (R. 128-129), pursuant to Section 129 of the *Judicial Code*, as amended by the Act of February 13, 1925.

Questions Presented

1. Whether this suit is prohibited by Section 3224 of the *Revised Statutes*.

2. Whether this suit may be maintained where the appellant has a plain, adequate, and complete remedy at law.

3. Whether the bill presents a substantial question on the merits.

Statutes Involved

The applicable provisions of the statutes involved will be found in Appendices A and B, *infra*, pp. 75-101.

Statement

This suit was commenced in the District Court for the Southern District of California, Central Division, on July 2, 1935, by the Standard Packing Company, a corporation, as plaintiff, against Nat Rogan, individually and as Collector of Internal Revenue for the Sixth District of California, and E. M. Cohee, individually and as Chief Deputy Collector of Internal Revenue for said Sixth District, as defendants. (R. 4, 65.) From the bill

of complaint (R. 4-65) and the supplement thereto (R. 106-127), it appears that appellant is a California corporation with its principal offices and place of business at Vernon, in said State, where it is engaged in the business of processing hogs within the purview of the Agricultural Adjustment Act (R. 4-5). The appellee Nat Rogan is United States Collector of Internal Revenue at Los Angeles, California. (R. 5.)

At the time of filing the bill of complaint, processing taxes had been assessed against appellant with respect to the processing of hogs during the months of March, April and May, 1935, and at the time of filing the bill of complaint the amounts of such tax which were unpaid, due, owing and payable under the terms of the Agricultural Adjustment Act, as amended, as a result of extensions granted appellant by the Commissioner of Internal Revenue, were due and payable on or before the following dates in the following amounts (R. 16, 38):

May 31, 1935	$6,968.61	Tax for March
June 30, 1935	6,385.90	Tax for April
June 30, 1935	5,980.90	Tax for May,

amounting in the aggregate to $19,335.41, and appellant avers that additional taxes will be assessed against it from month to month thereafter (R. 17, 39).

Appellant avers that it has not paid such taxes and will be unable to pay such additional taxes which may thereafter become due and payable because payment thereof would result in an operating loss in its business to the extent of such payments, and that unless such taxes are paid when due, appellant will become liable to

the imposition of interest and heavy penalties. (R. 16-19, 38-40.) The bill prays for preliminary and thereafter permanent injunction against the appellee, restraining him from collecting or attempting to collect in any manner said taxes from appellant and for declaratory judgment. (R. 51-53.)

As a basis for such injunctive relief, the bill charges that the Agricultural Adjustment Act, as amended, is unconstitutional and the taxes imposed thereunder are illegal, for reasons not here material (R. 21-22, 40-45); hardship, in that appellant has sustained operating losses attributable to the imposition of processing taxes, and that unless the collection of such taxes is enjoined, such operating losses will continue, resulting in a permanent injury to appellant's business and good will (R. 16-18, 47-50); the threat of the imposition of interest and penalties by reason of nonpayment of such taxes and the filing of liens upon the property of appellant and distraint upon such property to enforce the collection of such tax (R. 18-19); that appellant is without an adequate remedy at law in that the tax rate is so high that operating losses would finally exhaust and deplete the assets and working capital of appellant and that it has not the resources to pay the taxes each month and bring action to recover each installment; that there is a threat of a multiplicity of suits and grave doubt as to the value of any judgment which appellant might obtain for the refund of any such taxes (R. 44-45); that at the time of the filing of the bill, there was a threat of removal of appellant's remedy at law to litigate the validity of such tax and the constitutionality of said Act, because there

was pending before the Congress a bill amendatory of the Agricultural Adjustment Act, which purported to deny to a processor the right to bring suit for the refund of processing taxes in the event said Act should be declared unconstitutional (R. 45); all of which appellant asserts would result in irreparable loss and damage (R. 49).

At the time of filing the bill of complaint, appellant filed a motion for preliminary injunction (R. 66), which motion was sustained on July 31, 1935 (R. 81-85). Prior to the hearing on the motion for preliminary injunction, appellee filed a motion to dismiss the bill of complaint (R. 74-75), which motion was denied (R. 76).

Under date of August 22, 1935, appellee filed his motion to vacate the injunction theretofore granted in said cause (R. 87-89), which motion was sustained on August 30, 1935 (R. 90-91). This appeal is from the interlocutory decree sustaining appellee's motion to vacate the preliminary injunction. (R. 128-134.)

Subsequent to the entry of the order sustaining appellee's motion to dissolve said injunction, appellant filed its supplement to bill of complaint and petition for declaratory judgment and injunction (R. 106-127), which pleads the enactment of amendments to the Agricultural Adjustment Act which became effective August 24, 1935, and avers that since the filing of the original bill of complaint, appellant has filed with the appellee as Collector of Internal Revenue returns showing the amount of processing tax payable under the Agricultural Adjustment Act, as amended, with respect to the processing of hogs

during the months of June and July, 1935. The net tax disclosed in said return was $1,360.30 for the month of June, and $2,251.26 for the month of July, which became due and payable on or before July 31, 1935, and August 31, 1935, respectively, and that the amount of tax payable by it with respect to the processing of hogs during the month of August, and which would become payable on or before September 30, 1935, amounted to $2,294.25. The appellant avers that such tax has not been paid, and that had it not been for the preliminary injunction heretofore granted herein, appellee would have proceeded to enforce collection of such tax by summary process including distraint, seizure and sale of appellant's property. (R. 112-113.) The supplemental bill further avers that failure of payment of such taxes will cause appellant to be liable to the imposition of heavy criminal and other penalties. (R. 113.)

The supplemental bill prays for the same relief sought in the original bill of complaint (R. 126), and makes similar charges with respect to the unconstitutionality of the Act and the illegality of the tax imposed thereunder (R. 112-125).

The supplemental bill challenges the constitutionality of the amendments to the Act which were approved and became effective August 24, 1935, for reasons not here material, and charges that such amendments have removed the remedy at law for the recovery of processing taxes, collection of which it seeks to enjoin herein, in the event the Act is declared unconstitutional (R. 115-125), and repeats its averments with respect to threat of multiplicity of suits and its fear that appellee would

be unable to respond in damages in the event appellant should be successful in obtaining judgment against him for the recovery of taxes alleged to have been illegally exacted (R. 122-124).

Notwithstanding its plea of hardship and operating losses sustained because of the imposition of processing taxes, appellant offers to pay into court processing taxes owing by it and such future accruals of taxes as may become due during the pendency of this suit. (R. 124.) An injunction pending appeal has been granted by this Court.

Summary of Argument

The Government has provided a complete system of corrective justice in the administration of its revenue laws, which is founded upon the idea of appeals within the executive departments, where, if the party aggrieved cannot obtain satisfaction, there are provisions for recovering the tax, after it is paid, by suit against the collecting officer. The taxpayer has an adequate remedy at law by paying the tax and suing for its recovery. Section 3224 of the *Revised Statutes* prohibits the maintaining of a suit in any court to enjoin the collection of a tax.

The bill of complaint fails to show that appellant has such right, title or interest in the funds representing the tax sought to be enjoined, as would permit appellant to seek injunctive relief in this proceeding. One who pleads unconstitutionality must show that the burden of the tax has been actually borne by him and not by another; he must show how the feature complained of does

specific injury to him and deprives him of his constitutional rights. If the taxes described in the bill and sought to be enjoined are actually borne by others, then such others are the real parties in interest. Since it does not appear that any injury has or may result to appellant, it has no right to maintain this proceeding.

The Court will examine the record for the purpose of determining whether the suit can be maintained, and upon finding that the proceeding has been erroneously commenced, will dismiss the bill. Upon an appeal from an interlocutory order, the power of the Court is limited to consideration of and action upon the order appealed from; but if it appears that the Court is without power to grant the relief prayed for, the bill may be dismissed and the litigation terminated. The constitutionality of a revenue measure may not be tested in an injunction proceeding, and the Declaratory Judgment Act cannot be invoked in any proceeding involving Federal taxes. This proceeding is prohibited by the Declaratory Judgment Act, as amended, and cannot be maintained.

Argument

Appellant has devoted the greater portion of its bill of complaint to a challenge of the constitutionality of the Agricultural Adjustment Act and to the validity of the processing taxes imposed by the Congress. Neither of these questions is material to a consideration of the questions presented by either the motion for preliminary injunction filed by the appellant (R. 66), the motion to dismiss the bill of complaint (R. 74), or the motion to

dissolve the preliminary injunction (R. 87), both filed by the appellee. It is firmly established that the constitutionality of a taxing statute may not be tested in a suit for injunction. *Bailey v. George,* 259 U. S. 16. It is likewise definitely settled that the validity of a tax cannot be challenged until it has first been paid. *Nichols v. United States,* 7 Wall. 122; *State Railroad Tax Cases,* 92 U. S. 575; *Snyder v. Marks,* 109 U. S. 189; *Corbus v. Gold Mining Co.,* 187 U. S. 455; *Dodge v. Osborn,* 240 U. S. 118; *Graham v. duPont,* 262 U. S. 234. The doctrine of "pay first and litigate later" is an elementary principle in our field of taxation. Therefore, neither the constitutionality of the Act, nor the validity of the tax will be considered in this brief.

I.

THE BILL OF COMPLAINT FAILS TO SET FORTH FACTS SUFFICIENT TO ENTITLE APPELLANT TO THE RELIEF PRAYED FOR.

1. The Maintenance of This Suit Is Prohibited by Statute

The right of a litigant to injunctive relief must stand or fall upon the sufficiency of the averments in the bill of complaint to show the existence of such special and extraordinary circumstances as are sufficient to bring the case within some acknowledged head of equity jurisprudence. The sufficiency of the bill herein is challenged. It is urged that such bill sets forth no facts, which, if true, would entitle appellant to the relief prayed for in

a court of equity, or to any injunctive relief in this cause. In view of these considerations, the court below denied appellant's motion for a preliminary injunction.

The statutes challenged by appellant impose taxes. It has been repeatedly announced by the Supreme Court as a fundamental principle of taxation that all governments have found it necessary to adopt stringent methods for the collection of taxes and to be rigid in their enforcement. The revenue measures of this country constitute a system which provides for their enforcement by officers commissioned for that purpose. This system provides safeguards of its own against mistake, injustice, or oppression, in the administration of such revenue laws. Appeals are allowed to specified tribunals as the lawmakers deem expedient. Remedies are also provided for recovering taxes which may have been exacted illegally. These factors prompt the courts to deny injunctive relief where a taxpayer has failed to exhaust his legal remedies. *Graham v. duPont*, 262 U. S. 234, 254-255; *Bailey v. George*, 259 U. S. 16, 20; *Dodge v. Osborn*, 240 U. S. 118, 121; *Snyder v. Marks*, 109 U. S. 189, 191-193; *State Railroad Tax Cases*, 92 U. S. 575, 615. This principle is given statutory effect in Section 267 of the *Judicial Code*, *infra*, p. 75.

As a further barrier to the prosecution of suits to enjoin the collection of taxes, the Congress has provided by Section 3224, *Revised Statutes*, *infra*, p. 76, that—

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." (*U. S. C.*, Title 26, Sec. 1543.)

The principal reason for such a provision, as the Supreme Court has pointed out in *Miller v. Nut Margarine Co.*, 284 U. S. 498, 509—

> "is that, as courts are without authority to apportion or equalize taxes or to make assessments, such suits would enable those liable for taxes in some amount to delay payment or possibly to escape their lawful burden and so to interfere with and thwart the collection of revenues for the support of the government."

The enactment of that section fortified the policy which requires that the Government shall not be impeded in the regular procedure adopted by the Congress for the important function of collecting the revenues required to maintain the Government. As so clearly stated by Mr. Justice Brandeis, in *Phillips v. Commissioner*, 283 U. S. 589, 595-597:

> "The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of the pecuniary obligations to the government have been consistently sustained. * * * Property rights must yield provisionally to governmental need. Thus, while protection of life and liberty from administrative action alleged to be illegal, may be obtained promptly by the writ of habeas corpus, * * *, the statutory prohibition of any 'suit for the purpose of restraining the assessment or collection of any tax' postpones redress for the alleged invasion of

property rights if the exaction is made under color of their offices by revenue officers, charged with the general authority to assess and collect the revenue. * * * This prohibition of injunctive relief is applicable in the case of summary proceedings against a transferee. Act of May 29, 1928, c. 852, §604, 45 Stat. 791, 873. Proceedings more summary in character than that provided in §280, and involving less directly the obligation of the taxpayer, were sustained in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272. It is urged that the decision in the *Murray* case was based upon the peculiar relationship of a collector of revenue to his government. The underlying principle in that case was not such relation, but the need of the government promptly to secure its revenues.

Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. * * * *Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied.* * * * " (Italics supplied.)

And again (p. 599):

" * * * *it has already been shown that the right of the United States to exact immediate payment and to relegate the taxpayer to a suit for recovery is paramount.*" (Italics supplied.)

In *Cheatham v. United States*, 92 U. S. 85, cited with approval and followed by the Court in *Phillips v. Commissioner*, supra, Mr. Justice Miller, speaking for the Court, said (pp. 88-89):

"It will be readily conceded, from what we have here stated, that the government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues.

"If there existed in the courts, State or National, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary. *Dows v. The City of Chicago,* 11 Wall. 108. While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, *the general government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed.* * * * " (Italics supplied.)

The effect of Section 3224, as construed and applied by the Supreme Court, may be summed up as follows: If the assessment is of a tax for revenue purposes, made and attempted to be enforced by the proper revenue officers of the United States under color of their offices, its collection cannot be stayed by injunction. *Phillips v. Commissioner*, supra; *Graham v. duPont*, supra; *Bailey v. George*, supra; *Dodge v. Brady*, 240 U. S. 122; *Dodge v. Osborn*, supra; *Corbus v. Gold Mining Co.*, 187 U. S. 455, 464; *Pacific Whaling Co. v. United States*, 187 U. S. 447, 451-453; *Snyder v. Marks*, supra; *State Railroad Tax Cases*, supra; *Cheatham v. United States*, supra.

The bill which appellant has filed shows nothing which removes the case from the inhibitions of the statute. It is averred that the Agricultural Adjustment Act is unconstitutional; yet the Supreme Court has uniformly held that even though the Act imposing the tax is unconstitutional, that does not afford a basis for injunctive relief. *Dodge v. Osborn,* supra; *Dodge v. Brady,* supra; *Bailey v. George,* supra. An injunction against the collection of the child labor tax was denied in *Bailey v. George,* supra, on the same day in which the Supreme Court in *Bailey v. Drexel Furniture Co.,* 259 U. S. 20, held the Child Labor Tax Act unconstitutional.

Appellant also asserts that the tax sought to be enjoined is illegal, and charges that "it is not a tax within the meaning of the Constitution" (R. 22, 43), and that "said so-called taxes are not in fact or in law taxes" (R. 114). This challenge is unanswerably settled by the Supreme Court in *Snyder v. Marks,* supra, where it is said (pp. 192-193):

> *"Hence, when, on the addition to the section, a 'tax' was spoken of, it meant that which is in a condition to be collected as a tax, and is claimed by the proper public officers to be a tax, although on the other side it is alleged to have been erroneously or illegally assessed. It has no other meaning in Section 3224. There is, therefore, no force in the suggestion that Section 3224, in speaking of a 'tax,' means only a legal tax; and that an illegal tax is not a tax, and so does not fall within the inhibition of the statute, and the collection of it may be restrained.*
>
> * * * * *

> "The inhibition of Section 3224 applies to all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. *The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it.* Such has been the current of decisions in the circuit courts of the United States, and we are satisfied it is a correct view of the law." (Italics supplied.)

Section 3224 was enacted in its present form in 1867, and it is significant that during all of the sixty-eight years the statute has been effective, the Supreme Court has not sustained an injunction in any case involving a tax imposed by a revenue measure of the United States. Appellant relies with confidence upon *Miller v. Nut Margarine Co.*, supra, as a basis for sustaining its right to injunctive relief. There the plaintiff had sold a product not taxable under the Oleomargarine Act in reliance upon determination by the courts and the Commissioner of Internal Revenue interpreting the Act as inapplicable in like cases and upon assurance from the Bureau of Internal Revenue that its product would not be taxed. After the plaintiff had been engaged in the manufacture and sale of its product for many months, the Commissioner changed his ruling, and while not attempting to collect from other makers of like products who had obtained injunctions in which he had acquiesced and which had become final, directed that the tax be enforced against the plaintiff's entire product from the beginning.

This would have destroyed the business, ruined the plaintiff financially and inflicted loss without remedy at law. Upon such a state of facts the Court held that there existed "extraordinary and exceptional circumstances" which made Section 3224 inapplicable. No circumstances have been recognized by the Supreme Court in any injunction case seeking to restrain the collection of a tax imposed by Congress as being sufficient to authorize injunctive relief. None of the averments relied upon by appellant as a basis for equitable relief meet the test imposed by Mr. Justice Butler, in *Miller v. Nut Margarine Co.*, supra.

All of the other cases in which Section 3224 has been held inapplicable by the Supreme Court, including those relied upon by appellant, have been carefully distinguished by Chief Justice Taft in *Graham v. duPont*, supra, where he said (pp. 257-258):

> "The cases complainant's counsel rely on do not apply. The cases of *Lipke v. Lederer*, 259 U. S. 557, and *Regal Drug Corporation v. Wardell*, 260 U. S. 386, were not cases of enjoining taxes at all. They were illegal penalties in the nature of punishment for a criminal offense. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, and *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, were suits by stockholders against corporations to restrain the corporations from paying taxes alleged to be unconstitutional. *Hill v. Wallace*, 259 U. S. 44, was in part a suit like the foregoing. It was a bill filed by members of the Chicago Board of Trade to prevent the governing board from applying to the Secretary of Agriculture to have the Board of

> Trade designated as a 'contract market' under the Future Trading Act on the ground that the Act was unconstitutional and its operation would impair the value of the board to its members. Without such designation, no member could have sold grain for future delivery without paying a prohibitive tax, and if he sold without paying the tax, he was subjected to heavy criminal penalties. To pay such a tax on each of the many thousands of transactions on the board and to sue to recover them back, would have been utterly impracticable. It would have blocked the entire future grain business of the country and would have seriously injured, not only the members of the board, but also the producing and consuming public. This phase of the situation was so clear that the government in effect consented to the temporary injunction. See *Hill v. Wallace*, 257 U. S. 310, s. c. 615. Under these extraordinary and most exceptional circumstances, it was held that Section 3224 was not applicable to prevent an injunction against collection of such a prohibitive tax imposed for the purpose of regulating the future grain business with all the unnecessary and disastrous consequences its enforcement would entail if the Act was unconstitutional. *Hill v. Wallace*, should, in fact, be classed with *Lipke v. Lederer*, supra, as a penalty in the form of a tax. Certainly we have no such case here."

All of the results predicted by appellant in its bill can be avoided by payment of the tax sought to be enjoined. If appellant deliberately violates the provisions of the Act with respect to the making of returns and the payment of taxes, it is in no different position than if it

deliberately violates any other law of the land. It must take the consequences of its own rash act.

Neither anticipation of a multiplicity of suits (*Dodge v. Osborn*, supra; *Pacific Whaling Co. v. United States*, supra; *City of Seattle v. Poe*, 4 F. (2d) 276 (W. D. Wash.)); injustice, hardship, irregularity, or inconvenience (*State Railroad Tax Cases*, supra; *Reinecke v. Peacock*, 3 F. (2d) 583 (C. C. A. 7th), certiorari denied, 268 U. S. 699); danger of loss of credit or inability to pay because of lack of funds (*Thornhill Wagon Co. v. Noel*, 17 F. (2d) 407 (E. D. Va.)); or that the tax is confiscatory, or too high (*Broadway Blending Corp. v. Sugden*, 2 Fed. Supp. 837, 839 (W. D. N. Y.); see also *McCray v. United States*, 195 U. S. 27); may be made the basis for injunctive relief.

It is submitted that due consideration of the grounds urged as exceptional by appellant do not justify a finding that the situation of appellant presents other or different hardships than quite frequently result, and which are more or less inherent, in cases of the exercise of the sovereign power to lay and collect taxes. That irreparable injury may threaten and come, if injunction is denied, furnishes no occasion for the exercise of a nonexistent judicial power. Neither does the alleged fact of an unsatisfactory or burdensome legal remedy to recover the taxes asserted to be wrongfully or illegally exacted justify the overriding of the express prohibition of the statute.

Lastly, it is averred, as evidence of irreparable loss, that the pendency of the measure in Congress denying

the right to litigate the validity of the taxes already paid and those sought to be enjoined is a basis for injunctive relief. Such a contention is and was insufficient as a circumstance to take this case out of the scope of Section 3224. Courts must apply the law as it exists and not as it is apprehended that it may in the uncertain future be made to provide. *Untermeyer v. Anderson*, 276 U. S. 440, 446. This same question was under consideration recently by this Court in *Fisher Flouring Mills Co. v. Vierhus*, 78 F. (2d) 889, and two companion cases, in which the District Court of the United States for the Western District of Washington had overruled motions for preliminary injunctions and had entered orders dismissing the bills of complaint. After appealing from the interlocutory decrees denying preliminary injunctions, the complainants below applied to this Court for injunctions pending their respective appeals. At the hearing injunctions were denied by this Court, and the reasons for so doing are clearly set forth in the opinion. In commenting upon the alleged threat of removal of the remedy at law by amendments to the Agricultural Adjustment Act, then pending before Congress, this Court said (p. 892):

> "It would be a strange procedure for a court of chancery to measure the adequacy of a remedy at law, not by what the law is at the time the equity suit is filed, but by certain nebulous conjectures of what the law *may* be at some future time. 'Jurisdiction is determined as of the time the suit was commenced.' *Pacific Telephone and Telegraph Co. v. City of Seattle*, 14 F. (2d) 877, 879. 'Equity acts in the present tense.' *Continental Securities Co.*

> *v. Interborough R. T. Co.* (D. C.), 207 F. 467, 471, affirmed 221 F. 44 (C. C. A. 2). The appellants had at the time of the commencement of these suits, and still have, a plain, adequate and complete remedy at law. Equity is not to be frightened into assuming jurisdiction by the bugaboo of dire prophecies of what the law *may* be in the future. 'To grant an injunction in anticipation of a possible injury to arise under a law that may never be passed, is, to say the least, unusual. What complainant's rights may be, and what relief should be afforded him in the event of the passage of such a law as he contemplates, cannot now be anticipated.' *Ryan v. Williams* (C. C.), 100 F. 172, 175. It would be an unwarranted encroachment by the judiciary upon the legislative branch of the government 'should the court attempt a race of diligence with Congress to defeat the applicability of an Act to a pending case.' *La Croix v. United States* (D. C. W. D. Tenn.), decided July 27, 1935, reported in 11 F. Supp. 817. We are unanimously of the opinion that this court should not be governed or influenced in its action by speculations or predictions regarding future Congressional enactments." (Italics supplied.)

Instances are of rare occurrence in which litigants have sought to rely upon threats alleged to exist by reason of pending legislation as a basis for equitable relief. In fact, it appears that there are but two reported cases, in addition to *Ryan v. Williams*, 100 Fed. 172 (E. D. Va.), cited by this Court in its opinion, supra, which are at all similar. Both of these cases entirely support the views expressed by this Court in *Fisher Flouring*

Mills Co. v. Vierhus, supra. In *Molson v. Montreal,* 23 Lower Canada Jurist 169 (Court of Queen's Bench), it appears that a statute of the Province of Quebec had authorized governing bodies of cities to subscribe for stock in such railway companies as they might deem for the interest of their particular city. The common council of Montreal had passed a by-law enabling the mayor to subscribe for stock in a certain railroad corporation. Before becoming effective such by-law was subject to the approval of the municipal electors. Before a vote was taken upon the by-law, a bill for injunction was filed by a municipal elector and property owner against the mayor and common council of Montreal, praying that the defendants and their officers be ordered to abstain from taking a vote of the electors. The court affirmed a decree dismissing the bill, stating (p. 172):

> "In the present case the appellant does not show by his declaration that he has actually suffered any injury. The pretended by-law is yet but a project. It can only take effect by the approval of the municipal electors, who may reject it, and therefore it may never become operative. *There is yet no injury done, no wrong to be remedied, and the appellant's action is altogether premature."* (Italics supplied.)

In *Roudanez v. Mayor, et al., of New Orleans,* 29 La. Ann. Rep. 271, the Supreme Court of Louisiana said (p. 272):

> "The question therefore presented for our decision is, can the plaintiffs, citizens and taxpayers of New Orleans, alleging that the defendants, the

mayor and administrators of the city, are about to hold an election to decide upon the levying of a tax under Act 20 of 1876, and that that act is unconstitutional, and that any tax levied by virtue thereof will be illegal and void, restrain and enjoin them from so proceeding?

"It is not pretended that any tax has been levied or is demanded of the plaintiffs. Nor is it even asserted that such tax will be levied, but only that it may be the result of the proposed election.

"We think that the danger apprehended is too remote and too contingent to form the basis of a proceeding in court to avert it.

"*Courts of justice have enough to do in dealing with real, existing, and present wrongs, without anticipating and combatting hypothetical evils of the future that may or may not arise. It will be time enough for the plaintiffs to complain when their rights are actually invaded, or when danger to their persons or property is imminent and impending.* There are too many contingencies at present between them and danger to justify them in resorting to law. Act No. 20 may yet be repealed, or the tax proposed may be voted down, or plaintiffs may cease to be taxpayers, or the railroad corporation may cease to exist, or forfeit its charter." (Italics supplied.)

At the time of the filing of the bill of complaint herein, adequate provision had already been made under Sections 3228, 3220, and 3226 of the *Revised Statutes*, as amended, *infra*, pp. 85-86, under which claims for the refunding of excise taxes alleged to have been illegally exacted, could be presented to the Commissioner of In-

ternal Revenue at any time within four years, or forty-eight months, after the payment of such disputed exactions, whereby appellant might join its payments of taxes for many months in one suit at law in the event the Commissioner should reject such claims for refund in whole or in part. Furthermore, the recent amendatory legislation to the Agricultural Adjustment Act contains none of the provisions complained of in the bill of complaint as an alleged threat to remove from appellant its remedy at law. On the contrary, Section 21 (g) of the *Agricultural Adjustment Act,* as now amended, *infra,* p. 85, expressly authorizes the Commissioner of Internal Revenue to entertain and allow claims for refund of processing taxes and expressly makes Section 3226 of the *Revised Statutes*, as amended, applicable to claims for refund and claims for credit with respect to processing taxes, and said Section 21 of said Act, as now amended, *infra*, p. 78, contains full, adequate and complete provisions for suits at law to recover any processing taxes which the Commissioner of Internal Revenue has refused to refund and which may have been exacted illegally.

If there is any reason why appellant should litigate the merits of the questions presented in its bill, it should make payment of the tax and bring an action in the proper court for its recovery. This ordinary remedy is both adequate and simple. No special and exceptional circumstances are suggested adequate to justify the extraordinary remedy of enjoining the Collector. Even in the enforcement of the collection of state taxes, where Section 3224, *Revised Statutes,* is unavailing, the Su-

preme Court has denied injunctive relief where an adequate remedy at law exists. *Matthews v. Rodgers,* 284 U. S. 521; *Stratton v. St. L. S. W. Ry.,* 284 U. S. 530.

In *State Railroad Tax Cases,* 92 U. S. 575, supra, the Supreme Court said (p. 613):

> "The government of the United States has provided both, in the customs and in the internal revenue, a complete system of corrective justice in regard to *all taxes imposed by the general government,* which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. *But there is no place in this system for an application to a court of justice until after the money is paid.*" (Italics supplied.)

However, as has already been shown, the court below was without power to grant injunctive relief in view of the inhibitions of Section 3224, *Revised Statutes,* and Section 267 of the *Judicial Code.* An analogous situation arose in *Smallwood v. Gallardo,* 275 U. S. 56, where suits were brought in the District Court of the United States for Porto Rico to restrain the collection of taxes imposed by the laws of Porto Rico. The cases were heard in the District Court and dismissed on the merits. The decision of the District Court was affirmed by the United States Circuit Court of Appeals for the First Circuit. After the decision by the Circuit Court of Appeals and before writs of certiorari were granted by the

Supreme Court, the Congress enacted a statute which provided—

> "That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico."

Because of the passage by Congress of an Act which took away the jurisdiction of the District Court in this class of cases, the Supreme Court reversed the decisions of the courts below and sent the cases back with directions to dismiss for want of jurisdiction.

2. Neither Hardship Nor Injustice May be Made the Basis For Injunctive Relief

Appellant urges as an exceptional circumstance that the continued payment of the tax, collection of which is sought to be enjoined, will result in undue hardship, and charges that "the business of said plaintiff in its packing of pork cannot endure or make such payments and continue to carry on such business, for the reason that the working capital allotted to such pork department of necessity will from time to time grow less and less and finally become entirely depleted." (R. 15-16, 37-38.) This contention is effectively answered by the Supreme Court in *State Railroad Tax Cases*, 92 U. S. 575, 614, in which Mr. Justice Miller, speaking for the Court, said:

> "We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say, that, in addition to illegality, hardship, or irregularity, the case must be brought within

some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or *hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax.* One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is, that it has no power to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the State. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the constitution of all the States, and by the theory of our English origin, is exclusively legislative. *Heine v. The Levee Commissioners*, 19 Wall. 660." (Italics supplied.)

In *Thornhill Wagon Co. v. Noel*, 17 F. (2d) 407 (E.D. Va.), the court refused to enjoin the enforcement of a levy under a warrant for distraint for Federal income and profits taxes, where complainant had alleged (p. 408) "that it was without funds at hand to satisfy the demand, and that it would have been destructive of its credit and business to have submitted to the avertisement of its personal property, and that, under this duress, it signed the waiver" extending the period for assessment of the tax.

There could perhaps be no greater hardship inflicted upon a taxpayer then to take from him his homestead. Yet in *Staley v. Hopkins*, 9 F. (2d) 976 (N. D. Tex.), the court dismissed the bill of complaint to enjoin the sale

of a homestead in a suit brought by a Collector of Internal Revenue to pay income tax levied against the plaintiff's wife.

Gouge v. Hart, 250 Fed. 802 (W. D. Va.), writ of error dismissed, 251 U. S. 542, was a suit to set aside a sale made pursuant to distraint proceedings, in which the Collector of Internal Revenue had bid in for the United States a portion of the real estate which had been levied upon. In dismissing the bill of complaint the court gave effect to Section 3224, Revised Statutes, holding that the word "restraining" as appearing in that Section is used in its broad popular sense of hindering or impeding, as well as prohibiting or staying, and that the statute is not limited in its application to suits for injunctive relief. As its reasons for holding that complainant could not maintain a suit to set aside and annul the sale, the court said (p. 805):

> "The language used in the *Nichols, Cheatham, Snyder, Whaling Co.*, and *Dodge* cases, *supra* (in addition to which see *U. S. v. Pacific R. Co.*, 27 Fed. Cas. 397, and *Calkins v. Smietanka* [D. C.] 240 Fed. 138, 146) shows, as it seems to me, that the Supreme Court has, arguendo, construed section 3224 as forbidding such suit as we have here. The statements that sections 3224, 3226, and 3227 (Comp. St. 1916 §§5947, 5949, 5950) set forth a "complete system of relief," and one that is "exclusive of all other relief," can be explained, as I think, on no other theory. And it must be admitted that these repeated expressions of opinion, not dropped unthinkingly in passing, but uttered as the result of careful consideration, are so highly persuasive as to be almost binding.

None but the most cogent and compelling reasons for a different construction of the statute would justify this court in adopting another construction. Instead of finding cogent reasons for restricting the statute to bills for injunction, it seems to me that the stronger reasons lead to the broader construction:

"(a) The necessity for freedom by the executive officers of the government from judicial interference in the matter of collecting taxes is so obvious, and the hardships occasionally thus imposed on taxpayers are so unimportant in comparison with the evil results of having the collection of taxes delayed by appeals to the courts, that it would seem rather clear from such considerations alone that Congress used the word "restraining" in section 3224 in its popular and broad sense, rather than in a technical and very narrow sense. And I have been unable to conceive of any good reason for an intent to prohibit injunction suits, while leaving open to the taxpayer other forms of equitable relief from a tax still in the process of being collected. To nullify a purchase of land by the government in an effort to collect taxes would embarrass the government, practically speaking, about as much as to enjoin the sale. Such striking inefficiency in legislation suggests strongly a too narrow construction of the language used."

In commenting upon the effect of hardship as a basis for equitable relief, the court said (p. 806):

"(d) The remarkable scarcity (even if not entire absence) of reported cases in which was asked the relief (against federal taxes) here asked would seem to indicate a general concurrence on the part of the bar in the theory that section 3224 forbids, not only injunctions, but also other forms of direct

equitable relief. It is true that, where the taxpayer is impecunious and the tax assessed is very large in amount, the remedy afforded by paying the tax and then suing to recover the amount paid may involve great hardship. But many laws (for instance, all criminal laws imposing fines) may operate much more harshly on the poor than on the well-to-do. And the imposition of taxes may involve occasionally the most extreme hardships in isolated cases, without affording a good reason for a strained construction of a statute. In *Pacific Steam Whaling Co. v. U. S.*, *supra*, 187 U. S. 447, 452, 23 Sup. Ct. 154, 156 (47 L. Ed. 253) it is said:

" 'It is said that, unless this application can be sustained, the petition is without remedy, and that there is no wrong without a remedy. While as a general statement this may be true, it does not follow that it is without exceptions, and especially does it not follow that such remedy must always be obtainable in the courts. Indeed, as the government cannot be sued without its consent, it may happen that the only remedy a party has for a wrong done by one of its officers is an application to the sense of justice of the legislative department.

" 'While it is true that ambiguous statutes are not readily so construed as to bring about general inconvenience or hardship, this doctrine does not seem to apply here. It must be apparent that a tax in excess of, or even approaching, the value of the taxpayer's property, will be very seldom assessed, and practically speaking never assessed, except where based on the ground of an alleged extensive violation of the internal revenue or custom laws. Usually, therefore, the taxpayer's property will afford a sufficient basis of credit to enable him to borrow and pay

the taxes, as preliminary to an action to recover the money.

* * * * *

"'It may possibly be, in view of Act March 4, 1913, c. 166, 37 Stat. 1016 (6 U. S. Comp. Stats. Ann. §5908), amending section 3186, Rev. Stats., that the government had never had a lien as against Mrs. Gouge and Campbell, trustee. But I do not see that the hardship inflicted on them by the acts of the tax officers is greater than that inflicted on Gouge—if the tax be as invalid and as unjust as complainants allege. And the power of the court does not depend upon the severity of the hardships complained of. If a statute forbids the maintenance of this suit, such fact makes an end of discussion. And section 3224 may—to my mind does—forbid this suit, notwithstanding the great, but temporary hardships alleged.'"

Although appellant relies upon an averment of hardship as a basis for equitable relief, the bill does not disclose that appellant has exhausted the relief from such hardship afforded by the Agricultural Adjustment Act, for it is specifically provided in Section 19(c) of said Act that—

"In order that the payment of taxes under this title may not impose any immediate undue financial burden upon processors or distributors, any processor or distributor subject to such taxes shall be eligible for loans from the Reconstruction Finance Corporation under section 5 of the Reconstruction Finance Corporation Act."

Said provision existed in said Act at the time of the filing of the bill of complaint herein and still remains

unchanged, whereby appellant may not complain of any hardships resulting from the payment of the tax, sought to be enjoined.

Since an averment of hardship does not afford a basis for injunctive relief, and since the bill of complaint sets forth no facts which remove this suit from the inhibitions of Section 3224, Revised Statutes, the court below rightly concluded that it was without power to grant injunctive relief.

3. The Threat of a Multiplicity of Suits is Wholly Illusory

Appellant urges as a basis for equitable relief that there is grave danger of a multiplicity of suits in case injunctive relief is denied. This contention is supported by the statement that it will be necessary to institute separate suits for the recovery of the tax paid for each month. There is no basis, either in fact or in law, for such a contention. Unless the Act should be declared unconstitutional, there will be no basis for any suits whatsoever. If the Act should be declared unconstitutional, one claim for refund and one suit for the recovery of all taxes which may have been paid by appellant is all that will be necessary.

A similar contention was before the Court in *Matthews v. Rodgers, supra*. There the Court entered into a learned discussion of the history of equity jurisdiction, as applied to tax litigation, and in commenting upon the alleged threat of a multiplicity of suits, said (pp. 529-530):

> "Appellees' bill of complaint does not state a case within the jurisdiction of equity to avoid multiplicity

of suits. As to each appellee a single suit at law brought to recover the tax will determine its constitutionality and no facts are alleged showing that more than one suit will be necessary for that purpose. See *Boise Water Co. v. Boise City*, 213 U. S. 276, 285-286; *Dalton Adding Machine Co. v. State Corporation Comm.*, 236 U. S. 699, 700-701.

"But it is said that since each appellee must pay the tax to avoid penalties and criminal prosecution, all must maintain suits for the recovery of the tax unconstitutionally exacted, in order to protect their federal rights, and that to avoid the necessity of the many suits, equity may draw to itself the determination of the issue necessarily involved in all the suits at law.

"In general, the jurisdiction of equity to avoid multiplicity of suits at law is restricted to cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties, involving the same issues of law or fact. It does not extend to cases where there are numerous parties plaintiff or defendant, and the issues between them and the adverse party are not necessarily identical. *St. Louis, Iron Mountain & Southern Ry. Co. v. McKnight*, 244 U. S. 368, 375; *Kelley v. Gill*, 245 U. S. 116, 120; *Francis v. Flinn*, 118 U. S. 385; *Scott v. Donald*, 165 U. S. 107, 115; *Hale v. Allinson*, 188 U. S. 56, 77 *et seq.*; and see Pomeroy, Equity Jurisprudence (4th ed. 1918), §§251, 251½, 255, 259, 268.

"While the present bill sets up that the single issue of constitutionality of the taxing statute is involved, the alleged unconstitutionality depends upon the application of the statute to each of the appellees, and its effect upon his business, which is alleged to

be interstate commerce. The bill thus tenders separate issues of law and fact as to each appellee, the nature of his business and the manner and extent to which the tax imposes a burden on interstate commerce. The determination of these issues as to any one taxpayer would not determine them as to any other. There was thus a failure of such identity of parties and issues as would support the jurisdiction in equity."

The language of this Court in *Fisher Flouring Mills Co. v. Vierhus, supra*, with respect to a similar contention as to the danger of multiplicity of suits is equally pertinent. See *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276, 286; *City of Seattle v. Poe*, 4 F. (2d) 276 (W. D. Wash.). It follows that multiplicity does not exist where it consists merely of a series of suits by the same litigant, involving the same question, in any one of which suits the matter at issue could be determined. The consideration which governs courts of equity in intervening in order to present multiplicity of suits does not enter here.

4. Absence of a Remedy at Law Does Not Make Inapplicable the Provisions of Section 3224, Revised Statutes, or Section 21 (a) of the Agricultural Adjustment Act, as Amended.

Appellant charges that the amendments to the Agricultural Adjustment Act which became effective August 24, 1935, deprive it of an adequate remedy at law, and asserts that there are thereby created such extraordinary and exceptional circumstances as to justify the granting of injunctive relief. The Supreme Court has never held in

any case dealing with the application of Section 3224, Revised Statutes, in its prohibition of injunctive relief from the exaction of a tax imposed by the Congress, that the absence of a remedy at law for the recovery of taxes alleged to have been illegally exacted is such an extraordinary and exceptional circumstance as to render the provisions of Section 3224, Revised Statutes, inapplicable. On the contrary, in at least two cases which have never been distinguished, criticized, or reversed, the Supreme Court has denied injunctive relief in spite of the showing of an entire and absolute absence of a remedy at law. *Graham v. duPont, supra; Pacific Whaling Co. v. United States, supra.*

Moreover, the same reasons which deny to appellant the right to challenge the constitutionality of the Agricultural Adjustment Act or the validity of the tax imposed by the Congress thereunder in this suit apply with equal force to its rights to challenge in this suit the constitutionality of the amendments to the Act. Appellant vigorously assails the constitutionality of Section 21 of the amendatory legislation, and particularly subdivisions (a) and (d) of the Section.

Having in mind the right of the Government to prescribe the conditions on which it will subject itself and its officers to the judgment of the courts in the collection of its revenues (*Cheatham v. United States, supra*), and recognizing the imperative necessity for prompt collection of the revenue imposed under the Agricultural Adjustment Act, the Congress incorporated in the amendatory legislation certain procedural and remedial provisions.

a. Section 21(a) Does Not Deprive Appellant of Any Vested Rights

Section 21(a) of the Act broadens the scope of Section 3224 of the Revised Statutes, and is a specific prohibition against granting injunctive relief with respect to the collection of processing taxes imposed by the Agricultural Adjustment Act.

There is no doubt as to the power of Congress to limit the jurisdiction of the courts which it has created. *Cary v. Curtis*, 3 How. 235. Under Section 1 of Article III of the Constitution, Congress is granted the power to ordain and establish inferior courts. There is no presumption in favor of the jurisdiction of any such courts. In fact every presumption is against jurisdiction. *Young v. Main*, 72 F. (2d) 640, (C.C.A. 8th); *Robertson v. Cease*, 97 U. S. 646. Congress may grant, withhold, or restrict such jurisdiction at its discretion. In commenting on this power of Congress in *Kline v. Burke Constr. Co.*, 260 U. S. 226, the Court said (pp. 233-234):

> "The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases and controversies but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.

Turner v. Bank of North America, 4 Dall. 8, 10; *United States v. Hudson & Goodwin,* 7 Cranch, 32; *Sheldon v. Sill,* 8 How. 441, 448; *Stevenson v. Fain,* 195 U. S. 165. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. *The Mayor v. Cooper,* 6 Wall. 247, 252. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. *The Assessors v. Osbornes,* 9 Wall. 567, 575. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right. * * *"

Since there is no vested right to an injunction against collecting taxes claimed to have been illegally exacted (*Smallwood v. Gallardo, supra*), appellant cannot complain because of the provisions of Section 21(a). This section completely divests the courts of power to enjoin the collection of processing taxes imposed on or after August 24, 1935.

b. Section 21 (d) Affords an Adequate Remedy at Law

Section 21(d) of the amendatory legislation is made the basis of a special attack by appellant. The validity of the section is challenged as being repugnant to the due process clause of the Constitution, in that it is charged appellant's remedy at law has been removed. To sustain

its contentions, appellant persists in placing upon the Section impossible and unreasonable interpretations resulting in a construction of the provisions of the Section most adversely to itself. Statutes levying taxes are not extended by implication beyond the clear import of the language used, and in case of doubt are construed most strongly against the Government. *Gould v. Gould,* 245 U. S. 151; *Hecht v. Malley,* 265 U. S. 144; *Helvering v. Stockholms &c. Bank,* 293 U. S. 84, 93. In the cases already referred to, it has been shown that the Supreme Court has held repeatedly that where a statute provides a method for the recovery of a tax, in case of illegality, the remedy is exclusive. Section 21(d) affords such a remedy. Even if the remedy so afforded is inadequate, it is urged that the court is without jurisdiction in equity. The validity of the Section may be tested in a suit at law. *United States v. Jefferson Electric Co.,* 291 U. S. 386.

It seems clear that Section 21(d) affords an adequate remedy and that its constitutionality must be sustained. If the Act should ultimately be held unconstitutional, the Section clearly provides that any amount of the tax as to which appellant has borne the burden should be refunded to him. The Section is not subject to the strained construction contended for by appellant, to the effect that it may not recover any part of the tax unless it shows that it has borne the burden of the whole of it. It is apparent from the text that "passed on any part of such amount" and related clauses refers to the amount to be refunded. In other words *any* amount which has not been "passed on" or "passed back" shall be refunded. The discussion

on the floor of the Senate discloses that Congress intended that the Section should be given a fair and liberal interpretation. Cong. Rec., Vol. 79, No. 169, pp. 13700-13702, Appendix B, *infra*, p. 97.

The Act under consideration has always contained adequate provisions for the administrative consideration of claims for the refund of processing taxes alleged to have been illegally exacted and for suit at law in the event of rejection of such claims for refund in whole or in part. Sections 19 (b) and 21 (g) of the Act make applicable Sections 3220, 3226, and 3228, *Revised Statutes* (Appendix B, *infra*, p. 85), and afford to appellant all of the remedies which any taxpayer has ever had for the recovery of taxes erroneously or illegally collected or for testing the validity of the tax in controversy. Section 21 (d) has not deprived appellant of any of these remedies, but has merely prescribed the procedure to be followed requisite to the filing of suit for the recovery of the controverted tax, and in line with unbroken precedent requires the claimant to show that he is in fact the taxpayer and entitled to repayment of the exaction. The principle so incorporated in the statute is but legislative recognition of the rule which requires any taxpayer to sustain the burden of proving that he has in fact sustained the burden of the tax, else he may not recover. *White v. Stone*, 78 F. (2d) 136 (C. C. A. 1st), certiorari denied, October 14, 1935; *Champ Spring Co. v. United States*, 47 F. (2d) 1 (C. C. A. 8th), certiorari denied, 283 U. S. 852; *Standard Oil Co. v. United States*, 5 Fed. Supp. 976, 985 (C. Cls.).

This same principle was recognized by this Court in *Fisher Flouring Mills Co. v. Vierhus,* supra.

Nor is this the first legislation where Congress has recognized that the burden of an excise is generally borne by the consumer. Familiar examples appear with respect to certain manufacturers' excise taxes where Congress has provided in instances where agreements or contracts have been entered into prior to the effective date of the tax for the sale or lease of an article subject to the tax, any new or additional liability must be discharged by the purchaser, while any reduction in liability shall be recovered by the purchaser.[1] When it developed as the result of extensive litigation that the Government had probably collected substantial amounts under Section 900 (3) of the *Revenue Acts of 1918* and *1921*, and Section 600 (3) of the *Revenue Act of 1924,* as taxes upon the sale of articles not properly taxable under those sections. Congress sought to prevent any unjust enrichment to taxpayers seeking refunds where the burden of the tax had been shifted to the consumer.

In making appropriations in 1927 and 1928 for the refund of internal revenue taxes erroneously and ille-

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[1]See Revenue Act of 1917, c. 63, 40 Stat. 300, Sec. 1007; Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 1312; Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 906; Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 605; Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 603; Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 423; Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 625, as amended by Pub. Res. No. 25, approved June 13, 1932, c. 246, 47 Stat. 302. For administrative recognition of this feature respecting excises, see Regulations 47, Articles 3 and 40, under the Revenue Act of 1921; Regulations 48, Article 1, under the Revenue Act of 1924; Regulations 52, Articles 8 and 34, under the Revenue Acts of 1918 and 1921; and Regulations 54, Articles 6 and 35, under Revenue Act of 1921.

gally collected, Congress provided that no part of such appropriations should be available to refund any amount collected under those sections unless the taxpayer should furnish a bond conditioned upon the repayment to the Government of any amount of such refund not distributed within six months to the person who purchased for consumption the article upon which the refund was made.[2] These provisions were adopted only as a temporary expedient until Congress could deal with the subject properly.[3] They were soon superseded by Section 424 of the *Revenue Act of 1928* which provided, *inter alia*, that no refund of taxes imposed by Section 900 (3) of the 1918 and 1921 Acts or Section 600 (3) of the 1924 Act should be made unless it is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, had been returned to him.

In this respect Section 21 (d) goes no further than Section 424 of the Revenue Act of 1928, and Section 621 of the Revenue Act of 1932. It is, indeed, patterned directly after those sections. Such provisions, in effect, embody a presumption that the tax has been passed on. As to excise taxes, this is a reasonable presumption of fact, being founded upon experience and backed by economic authorities. It is not conclusive, but is rebuttable.

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[2]See c. 226, 44 Stat. 1250, 1254; c. 5, 45 Stat. 12, 30; c. 126, 45 Stat. 162, 169.

[3]See H. Rep. No. 2, 70th Cong., 1st Sess., p. 27.

It is therefore legally unobjectionable. See *Schlesinger v. Wisconsin,* 270 U. S. 230; *Heiner v. Donnan,* 285 U. S. 312. The similar presumptions in the Revenue Acts of 1928 and 1932 have been uniformly upheld by the courts. *United States v. Jefferson Electric Co.,* supra; *Jefferson Electric Mfg. Co. v. United States,* 10 Fed. Supp. 950 (C. Cls.); *Virginia-Carolina Rubber Co. v. United States,* 7 Fed. Supp. 299 (C. Cls.).

In *United States v. Jefferson Electric Co.,* supra, the Court said (pp. 402-403):

> "But it cannot be conceded that in imposing this restriction the section strikes down prior rights, or does more than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief. This plainly is but another way of providing that the money shall go to the one who has been the actual sufferer and therefore is the real party in interest.
>
> * * * * *
>
> "The present contention is particularly faulty in that it overlooks the fact that the statutes providing for refunds and for suits on claims therefor proceed on the same equitable principles that underlie an action in assumpsit for money had and received. Of such an action it rightly has been said:
>
> "This is often called an equitable action and is less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which *ex acquo et bono* belongs to the plaintiff. It

> was encouraged and, to a great extent, brought into use by that great and just judge, Lord Mansfield, and from his day to the present, has been constantly resorted to in all cases coming within its broad principles. It approaches nearer to a bill in equity than any other common law action."

Appellant insists that the burden of proof required by Section 21 (d) is impossible to sustain; that the difficulties are insuperable; and being impossible of being complied with, is invalid. This requirement in Section 21 (d) is severable from the remainder of the Act. If it falls because of impossibility of compliance, then the procedure for the prosecution of claims for refund provided in other sections of the Act and at common law become absolute. The position taken by appellant and other processor litigants is that no processor can prove whether, or to what extent it has borne the burden of the tax. Whether appellant or any other individual processor has borne the burden of the tax is a question of fact. Whether evidence submitted in proof of such fact is sufficient is a question of law.

Representations made by appellant for the purpose of supporting its contentions that this essential fact is not susceptible of proof are therefore merely conclusions and without basis in fact. On the contrary it may easily be demonstrated that such arguments are wholly unsound. By Section 15 (c) of the Act processed commodities sold to any organization for charitable distribution or use, or to any state or Federal welfare organization, for its own use, are exempt from the imposition of the tax, and provision is made for the refund or

credit of the amount of any tax paid upon such tax exempt commodities. By Section 17 (a) of the Act it is provided that upon the exportation to any foreign country of any processed commodities upon which the tax has been paid, a credit or refund of such tax shall be allowed to the consignor named in the bill of lading under which the product is exported or to the shipper or to the person liable for the tax.

Under the two statutory exemptions just mentioned and the Treasury Regulations promulgated thereunder, thousands of claims for refund and/or credit have been and are being presented to the Commissioner of Internal Revenue by processors, distributors, consignors, and others entitled to file such claims pursuant to such statutory provisions, and thousands of such claims have been and are being allowed by the Commissioner of Internal Revenue and are being paid or credited to such claimants. The Annual Report of the Commissioner of Internal Revenue for the fiscal year ended June 30, 1934, of which courts will take judicial notice, discloses that during the period covered by the report (p. 17), 45,278 claims for refund or credit of processing taxes refundable under Sections 15 (c) and 17 (a) of the Act were filed with the Commissioner of Internal Revenue, aggregating the amount of $27,273,763.98, of which 14,878 claims, aggregating $3,267,186.34, were allowed; 2,366 claims, aggregating $1,846,365.86, were rejected; and 28,034 claims, aggregating $22,160,211.78, were on hand June 30, 1934, in process of consideration. A similar report for the fiscal year ended June 30, 1935, will soon

be available for distribution and will disclose similar statistics on a greatly increased scale.

It is obviously not impossible for the processor, distributor or exporter, whichever may be entitled to the refund or credit under the statute, to establish how much of the tax paid upon the processed commodity and actually passed on to the purchaser or how much of the tax paid upon the processing of a commodity had actually been included in the processor's selling price of a given processed commodity. The same elements of computation and the same principles of accounting which enable a processor to prepare a claim for refund or credit of processing taxes refundable under Sections 15(c) and 17 (a) of the Act are available to him in the preparation of claims for refund and supplying the proof contemplated by Section 21(d) of the Act.

The Regulations promulgated by the Secretary of Agriculture and the Secretary of the Treasury pursuant to authority of Sections 10 (c) and 10 (d) of the Agricultural Adjustment Act, as amended, and Section 1101 of the Revenue Act of 1926, *infra*, p. 114, include conversion factor tables for each basic commodity subject to the tax and articles processed therefrom to determine the amount of tax imposed or refunds to be made with respect to integral parts of such processed commodity. The conversion factor tables applicable to hogs and pork products are incorporated in Treasury Decision 4518 (Appendix C, *infra*, pp. 103-131), promulgated January 15, 1935, which superceded Treasury Decisions 4406 and 4425, of similar import. By the use of these conversion factor tables the amount of tax paid on a given

quantity of any particular cut of the hog carcass, or of cured cuts, may readily be determined, and through the application of modern methods of accounting, it can be determined with equal facility whether the amount of the tax or any part thereof so paid on such processed products or by-products has been included in the sale price of such article or articles. In this connection a pertinent statement by Judge Yankwich of the Southern District of California in his opinion filed October 28, 1935, but not yet reported, in *Anton Rider v. Rogan*, is very persuasive, where he said:

> "One would gather from the statement of the difficulties in the amended Bill of Complaint and in the oral argument that the difficulties are insuperable. Yet the Bill states:
>
> " 'That when paid by plaintiffs said taxes become part of the cost to them of the product which they ultimately sell to their customers.'
>
> "It would seem to us that, with the high development of cost accounting at the present time, it should not be difficult to trace that initial cost. We take judicial notice of the fact that modern systems of accounting have become so accurate that manufacturers are able to trace, in industrial establishments of the most complex character, (such as automobile plants), the approximate cost of every process or every part of process which goes into the making of the whole product. Evidence of expert cost-accountants is often received in court. That such a system might be readily applied to the proof in recovery cases is also evidenced by the fact that the Treasury Department in its circular dated January 25, 1935, denominated T.D. 4518, has set up a method of

> tracing processing taxes to the various products involved in hog processing. This indicates that it is possible to trace the processing tax to the various ultimate products."

It would thus seem that the representations of appellant with respect to the impossibility of proof of the requirements of Section 21 (d) are wholly illusory, imaginary, and unconvincing.

Appellant assails Section 21 (d) because it does not appear that a trial *de novo* is granted for the litigation of the refund of processing taxes which may be rejected by the Commissioner of Internal Revenue. That failure to provide for trial *de novo* before a jury is not objectionable is well illustrated by the remedy provided for recovery of customs and import duties. Since enactment of the Customs Administration Act of June 10, 1890, c. 407, 26 Stat. 138, no trial by jury has been provided in customs cases. *Schoenfelt v. Hendricks*, 152 U. S. 691; In re *Kurscheedt Manuf'g Co.*, 49 Fed. 633 (S.D.N.Y.), affirmed 54 Fed. 159 (C.C.A. 2d); *In re White*, 53 Fed. 787 (S.D.N.Y.); *Austin Baldwin & Co. v. United States*, 139 Fed. 1005 (S.D. N.Y.); *Schoellkopf, Hartford & Maclaglan v. United States*, 147 Fed. 855 (N.J.); *Vandiver v. United States*, 156 Fed. 961 (C.C.A. 3d). Under that Act and subsequent acts the importer's remedy was limited to appeal from the decision of the collector of customs to the Board of General Appraisers, then to the Federal District Courts. The District Courts had authority under the statutes to direct the taking of further evidence. *In re F. W. Myers & Co.*, 123 Fed. 952 (N.D. N.Y.). But the right to introduce further evi-

dence was limited. *United States v. China & Japan Trading Co.*, 71 Fed. 864 (C.C.A. 2d); *William F. Allen & Co. v. United States*, 127 Fed. 777 (E.D. Pa.); *J. S. Plummer & Co. v. United States*, 166 Fed. 730 (C.C.A. 2d); affirming 160 Fed. 284 (S.D. N.Y.). The remedy provided by that statute was exclusive. *United States v. Lies*, 170 U. S. 628. For a discussion of remedy prior to creation of the Court of Customs Appeals see *Stegeman v. United States*, 1 Cust. App. 208.

Since creation of the Court of Customs Appeals by the Act of August 5, 1909, c. 6, 36 Stat. 91, the importer's sole remedy is limited to appeal from the decision of the Customs Court (formerly the Board of General Appraisers, the name of which was changed by the Act of May 28, 1926, c. 411, 44 Stat. 669) to the Court of Customs Appeals. Decisions of the Court of Customs Appeals are reviewed by the Supreme Court in accordance with the provisions of the Judicial Code (Title 28, U.S.C., Secs. 301-311). Cf. *Nichols & Co. v. United* States, 249 U. S. 34; *Five Per Cent. Discount Cases*, 243 U. S. 97; *Vitelli v. United States*, 250 U. S. 355; *United States v. Aetna Explosives Co.*, 256 U. S. 402; *United States v. Rice & Co.*, 257 U. S. 536.

The adequacy of the remedy in customs cases cannot be questioned. *In Ex parte Bakelite Corp'n*, 279 U. S. 438, the Supreme Court said (pp. 457-458):

> "Before we turn to the status of the Court of Customs Appeals it will be helpful to refer briefly to the Customs Court. Formerly it was the Board of General Appraisers. Congress assumed to make the board a court by changing its name. There was

no change in powers, duties or personnel. The board was an executive agency charged with the duty of reviewing acts of appraisers and collectors in appraising and classifying imports and in liquidating and collecting customs duties. But its functions, although mostly quasi-judicial, were all susceptible of performance by executive officers and had been performed by such officers in earlier times.

"The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. The full province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the Customs Court, formerly called the Board of General Appraisers. The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers. True, the provisions of the customs laws requiring duties to be paid and turned into the Treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. *In fact their final determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings.*" (Italics supplied.)

While an administrative remedy for the recovery of processing taxes would have been adequate, Congress has not so limited it. The remedy provided for review of the findings of the Commissioner of Internal Revenue is judicial. Cf. *Old Colony Tr. Co. v. Commissioners,* 279 U. S. 716, 723; *Tagg Bros. v. United States,* 280 U. S. 420, 443-444. Congress can unquestionably provide for an administrative determination of facts with a judicial review by the courts in such manner as may be prescribed by it. *Auffmordt v. Hedden,* 137 U. S. 310, 325, 329; *Fong Yue Ting v. United States,* 149 U. S. 698, 714-715.

There is no distinction between the constitutional rights of an importer in connection with erroneous or illegal exactions of duty and such rights of one from whom internal revenue is exacted. In both instances the attacks are made under the due process clause of the Fifth Amendment and under the jury clause of the Seventh Amendment. Both involve money taken and remedies to test the validity of the taking.

The remedy provided by Section 21 (d), although limited to a hearing before the Commissioner of Internal Revenue with review by the courts, is a judicial remedy. In *Old Colony Tr. Co. v. Commissioner,* 279 U. S. 716, 723, a case originating in the United States Board of Tax Appeals, the Supreme Court said:

> "It is not necessary that the proceeding to be judicial should be one entirely *de novo;* it is enough that, before the judgment which must be final has invoked as an exercise of judicial power, it shall have certain necessary features. * * *."

That the legal remedy may be circumscribed by certain limitations is not objectionable. In *Rees v. City of Watertown,* 19 Wall. 107, the Supreme Court says of equity (p. 121):

> "Lord Talbot says, 'There are cases, indeed, in which a court of equity gives remedy where the law gives none, but where a particular remedy is given by law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and extend it further than the law allows.'"

The remedy afforded under 21 (d) is not a denial of due process. Due process of law is not necessarily judicial process. *Murray's Lessee v. Hoboken Land & Imp. Co.,* 18 How. 272; *Davidson v. New Orleans,* 96 U. S. 97; *Ex parte Wall,* 107 U. S. 265, 289; *Pittsburgh &c. Railway Co. v. Backus,* 154 U. S. 421; *Bushnell v. Leland,* 164 U. S. 684; *Buttfield v. Stranahan,* 192 U. S. 470; *Public Clearing House v. Coyne,* 194 U. S. 497; *Weimer v. Bunbury,* 30 Mich. 201; *Reetz v. Mich.,* 188 U. S. 505, 507; *Dreyer v. Illinois,* 187 U. S. 71, 83; *People v. Hasbrouck,* 11 Utah 291.

In *Tagg Bros. v. United States,* 280 U. S. 420, the Court said (pp. 443-444):

> "A proceeding under §316 of the Packers and Stockyards Act is a judicial review, not a trial *de novo.* The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him,—save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered

> or decided now. *Louisville & Nashville R.R. Co. v. United States,* 245 U. S. 463, 466; Cf. *Lescio v. Campbell,* 34 F. (2d) 646, 647, and see *Prendergast v. New York Telephone Co.,* 262 U. S. 43, 50, and *Ohio Valley Water Co. v. Ben Avon Borough,* 253 U. S. 287, 289. On all other issues his findings must be accepted by the court as conclusive, if the evidence before him was legally sufficient to sustain them and there was no irregularity in the proceedings. * * *."

And the same is true where individual property rights are involved. *Hawkins v. Bleakly,* 243 U. S. 210; *New York Central R.R. Co. v. White,* 243 U. S. 188; employees' compensation where the findings of administrative bodies were subject to appellate review only. *Dahlstrom Metallic Door Co. v. Industrial Board of N. Y.,* 284 U. S. 594; *Crowell v. Benson,* 285 U. S. 22.

See also: *Kentucky Railroad Tax Cases,* 115 U. S. 321; *State Railroad Tax Cases,* 92 U. S. 575; *Plymouth Coal Co. v. Pennsylvania,* 232 U. S. 531, 545; *Douglas v. Noble,* 261 U. S. 165, 167; *Title Guaranty & S. Co. v. Idaho,* 240 U. S. 136; *Hurwitz v. North,* 271 U. S. 40, 42; *Oregon R.R. & N. Co. v. Fairchild,* 224 U. S. 510, 527; *Wadley Southern Ry. Co. v. Georgia,* 235 U. S. 651, 661; *New York & Queens Gas Co. v. McCall,* 245 U. S. 345, 348; *Napa Valley Co. v. R. R. Comm.,* 251 U. S. 366, 370; *North. Pacific v. Dept. Public Works,* 268 U. S. 39, 42; *Long Island Water Supply Co. v. Brooklyn,* 166 U. S. 685, 695; *Crane v. Hahlo,* 258 U. S. 142, 147; *Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.,* 284 U. S. 151; Cf. *Pacific Live Stock Co. v. Oregon Water Bd.,* 241 U. S. 440, 451, 452.

While this Court has granted injunctions pending appeal in this and other appeals now pending before the Court, this Court also denied injunctions pending appeal in *Fisher Flouring Mills Co. v. Vierhus, supra,* and two allied cases. On November 5, 1935, the United States Circuit Court of Appeals for the Fifth Circuit, with Judges Foster, Sibley and Strum sitting, in *Rickert Rice Mills, Inc. v. Fontenot, Collector,* and seven allied cases, denied the applications of the plaintiff appellants for injunctions pending appeal and entered and filed the following *per curiam* opinion and order, not yet reported:

> "On consideration of the application for an injunction to stay collection of taxes levied under the provisions of the Agricultural Adjustment Act, as amended by the Act of August 24, 1933, the Court is of the opinion that the taxpayer has a remedy at law to recover back any taxes illegally exacted and, further, that the provisions of the Act as amended deprive the Court of jurisdiction to grant injunctive relief.
>
> "It is ordered that the application be denied."

Similar action was previously taken by the same Court on September 13, 1935, in *Jose Escalante & Co. v. Fontenot, Collector,* and two allied cases.

c. Difficulty of Proof is Not Inadequacy of Remedy

Where the statutory law sets up in terms a complete and adequate legal remedy, equity will not intervene, and certainly not to restrain tax collection, because a particular plaintiff may find that he is without the factual means to avail himself of it. The appellant confuses adequacy of remedy with difficulty of proof.

See: *Rees v. City of Watertown,* 19 Wall. 107, 124; *Thompson v. Allen County,* 115 U. S. 550, 554; *Safe-Deposit & Trust Co. v. City of Anniston,* 96 Fed. 661, 663 (C.C. N.D. Ala.); *Willis v. O'Connell,* 231 Fed. 1004, 1015 (S.D. Ala.); *Pamozzo v. Carborundum Co.,* 7 Fed. Supp. 317, 318 (W.D. N.Y.); *Newell v. Nichols,* 75 N. Y. 78, 90; *Marlin Fire Arms Co. v. Shields,* 171 N. Y. 384, 391; *Underwood v. Wing,* 4 De Gex, M & G. 633, 43 Eng. Rep. 655.

There should be applied here the general principle applied in all cases where a refund of tax is sought—the taxpayer must show the facts upon which he predicates his claim and, if he cannot, the misfortune must be borne by him as in any other case of a failure of proof. *Burnet v. Houston,* 283 U. S. 223, 228; *Perfection Gear Co. v. United States,* 41 F. (2d) 561, 562 (C. Cls.).

In *Burnet v. Houston, supra,* the Supreme Court, reversing a judgment of the Circuit Court of Appeals for the Third Circuit which had reversed a decision of the Board of Tax Appeals sustaining disallowance of a deduction for a loss, answering the contention of the taxpayer that it was impossible to prove the loss he had sustained, in an unanimous opinion written by Mr. Justice Sutherland, stated (p. 228):

> "We cannot agree that the impossibility of establishing a specific fact, made essential by the statute as a prerequisite to the allowance of a loss, justifies a decision for the taxpayer based upon a consideration only of the remaining factors which the statute contemplates. The definite requirement of §202 (a) (1) of the act is not thus easily to be put aside. The impossibility of proving a material fact upon which

> the right to relief depends, simply leaves the claimant upon whom the burden rests with an unenforcible claim, a misfortune to be borne by him, as it must be borne in other cases, as the result of a failure of proof. Compare *Underwood v. Wing*, 4 De Gex, M. & G. 632, 660; *Newell v. Nichols*, 75 N. Y. 78, 90; *Estate of Ehle*, 73 Wis. 445, 459-460; 41 N. W. 627; 2 Chamberlayne, Modern Law of Evidence, Section 970."

Since the facts alleged in the bill of complaint fail to show any special and extraordinary circumstances sufficient to bring this case within some acknowledged head of equity jurisprudence, the court below rightly concluded that it was without power to grant injunctive relief, and properly sustained appellee's motion to dissolve the preliminary injunction.

II.

APPELLANT IS WITHOUT EQUITY IN SEEKING INJUNCTIVE RELIEF

It is incumbent upon appellant to affirmatively show in its bill of complaint that it has such right, title or interest in the proceeds of the tax, collection of which it seeks to enjoin, as would result in specific injury to it if it pays the tax. That is to say, it must appear that the burden of the tax has been actually borne by him who seeks to recover or retain it. Through the absence of such a showing appellant has failed to establish that it is the real party in interest.

The reasoning of the Court as expressed in *United States v. Jefferson Electric Co.*, 291 U. S. 386, is applic-

able to the situation now under consideration. In a suit for refund it was held necessary for a taxpayer to allege and prove that he had borne the burden of the tax. Equity follows the law and requires a suitor to clearly show his right to equitable relief. The Court said (p. 400):

> "We cannot assent to the view that a court may give a judgment awarding the taxpayer a refund without inquiring whether he has borne the burden of the tax or has reimbursed himself by collecting it from the purchaser. * * *"

As to the equities requiring a taxpayer to establish his right to the funds in question, the Court further said (p. 402):

> "If the taxpayer has borne the burden of the tax, *he readily can show it; and certainly there is nothing arbitrary in requiring that he make such a showing.* * * *" (Italics supplied.)

The effect of the decision in the case of *United States v. Jefferson Electric Co., supra,* is such that one who pleads unconstitutionality must show that the burden of the tax has been actually borne by him and not by another. Compare *Champ Spring Co. v. United States,* 47 F. (2d) 1, 3 (C.C.A. 8th), certiorari denied, 283 U. S. 852; *Shawnopin Country Club v. Heiner,* 2 F. (2d) 393 (W. D. Pa.).

In *Burk-Waggoner Oil Ass'n v. Hopkins,* 296 Fed. 492, 499 (N. D. Tex.), affirmed 269 U. S. 110, the court said:

> "A person in order to question the constitutionality of a statute, must show that the alleged uncon-

stitutional feature injures him, and, in fact, deprives him of rights secured to him by the Constitution. * * *"

This principle was recognized and followed by this Court in *W. C. Peacock & Co. v. Pratt,* 121 Fed. 772, 778, in affirming the decree of the court below in dismissing the bill. Compare *Mountain Timber Co. v. Washington,* 243 U. S. 219, 242; *Smiley v. Kansas,* 196 U. S. 447, 457; *Walsh v. Columbus &c. Railroad Co.,* 176 U. S. 469, 479.

In view of these considerations, it is urged that appellant is without sufficient equity to entitle it to the relief prayed for.

III.

THE DECLARATORY JUDGMENT ACT IS NOT AVAILABLE FOR LITIGATING QUESTIONS ARISING UNDER THE REVENUE LAWS OF THE UNITED STATES.

In this suit appellant seeks to invoke the provisions of the Declaratory Judgment Act. Sec. 274D, *Judicial Code, infra,* p. 75. Since this suit was commenced, the Declaratory Judgment Act has been amended (Sec. 405, *Revenue Act of 1935),* and as now amended specifically prohibits the maintenance of this suit. The situation thus presented is analogous to that which arose in *Smallwood v. Gallardo, supra,* where the Supreme Court reversed the decisions of the courts below, dismissing the suits on the merits and sent the cases back with directions to dismiss for want of jurisdiction, because after the Circuit Court of Appeals had rendered its decision affirming the deci-

sion of the District Court on the merits, the Congress had enacted a statute which removed from the courts the power to grant the relief prayed for in the bill of complaint. In a concise opinion by Mr. Justice Holmes, it is stated (p. 61):

> "To apply the statute to present suits is not to give it retrospective effect but to take it literally and to carry out the policy that it embodies of preventing the Island from having its revenues held up by injunctions; *a policy no less applicable to these suits than to those begun at a later day,* and a general policy of our law, Rev. Stat. Sec. 3224. So interpreted the Act as little interferes with existing rights of the petitioners as it does with those of future litigants. *There is no vested right to an injunction against collecting illegal taxes and bringing these bills did not create one.* * * *." (Italics supplied.)

In its opinion in the *Smallwood* case, the Court cited with approval its previous decision in *Hallowell v. Commons,* 239 U. S. 506, which involved the jurisdiction of a District Court of the United States over a suit affecting title to an allotment of Indian lands. After the institution of the suit, the Congress, by the Act of June 25, 1910, c. 431, 36 Stat. 855, conferred upon the Secretary of the Interior the sole jurisdiction to ascertain the legal heirs of a deceased allottee. The Court held that the Act deprived the Court of jurisdiction to determine the question and that when so applied the Act was valid. On that point the Court said (p. 509):

> "There is equally little doubt as to the power of Congress to pass the act so construed. We presume

> that no one would question it if the suit had not been begun. It is a strong proposition that bringing this bill intensified, strengthened or enlarged the plaintiff's rights, as suggested in *De Luisa v. Bidwell,* 182 U. S. 1, 199, 200. See *Simmons v. Hanover,* 40 Pick. 188, 193, 194. *Hepburn v. Curts,* 7 Watts, 300. *Welch v. Wadsworth,* 30 Connecticut, 149, 154. *Atwood v. Buckingham,* 78 Connecticut, 423. The difficulty in applying such a proposition to the control of Congress over the jurisdiction of courts of its own creation is especially obvious. See *Bird v. United States,* 187 U. S. 118, 124."

The Declaratory Judgment Act is procedural and not remedial. If there was ever any doubt as to the inapplicability of the Act for litigating questions arising under the revenue laws of the United States, any such doubt has been effectively removed by the amendment. It is now quite apparent that the Federal Courts are deprived of jurisdiction of all pending tax suits where the provisions of Section 274 D of the *Judicial Code, infra,* p. 75, have been invoked. In *Backus v. Fort Street Union Depot Co.,* 169 U. S. 557, 570, the Court said:

> "There is no vested right in a mode of procedure. Each succeeding legislature may establish a different one, providing only that in each are preserved the essential elements of protection."

There are many decisions of similar import, and it seems to be well settled that the mere institution of a suit does not convert a mode of procedure into a vested right. This principle was well stated in the opinion in *Campbell*

v. Iron-Silver Min. Co., 83 Fed. 643, 646 (C.C.A. 8th), where the Court said:

> "It cannot be said that the mere bringing of a suit entitles the party who brings it to have the same conducted at every stage according to the course of procedure which was prescribed by law when the suit was commenced. Actions are always brought in view of the known power of the legislature to change or modify rules of procedure at pleasure, and a litigant cannot consistently claim that, because the legislature takes away some privilege which was accorded to litigants when the suit was instituted, he is thereby deprived of a vested right. * * *"

Like the inhibitions of Section 3224, *Revised Statutes*, and Section 21 (a) of the *Agricultural Adjustment Act*, as amended, Section 274 D of the *Judicial Code*, as now amended, has removed any power which the Court may have had to grant declaratory relief in this type of case.

IV.

THE BILL OF COMPLAINT SHOULD BE DISMISSED

In this appeal the Court is confronted with the inhibitions of Section 3224, *Revised Statutes,* Section 21 (a) of the *Agricultural Adjustment Act,* as amended, and Section 274D of the *Declaratory Judgment Act,* as amended by Section 405 of the *Revenue Act of 1935.* Ordinarily, upon an appeal from an interlocutory order or decree, the Circuit Court of Appeals will content itself with passing upon the propriety of the interlocutory order or decree from which the appeal is taken. However, the

Supreme Court has made it quite clear that, if the Circuit Court of Appeals is clearly of the opinion that the bill of complaint is utterly devoid of equity, then the Circuit Court of Appeals may completely dispose of the case *in favor of the defendant* by directing that the plaintiff's bill be dismissed. *Smith v. Vulcan Iron Works,* 165 U. S. 518; *Ex parte National Enameling Co.,* 201 U. S. 156; *Metropolitan Co. v. Kaw Valley District,* 223 U. S. 519; *U. S. Fidelity Co. v. Bray,* 225 U. S. 205; *Meccano, Ltd. v. John Wanamaker,* 253 U. S. 136. In this last case, after reviewing previous cases, Mr. Justice McReynolds said (p. 141):

> "This power is not limited to mere consideration of, and action upon, the order appealed from; but, if insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated."

No case decided by the Supreme Court seems to have held that a Circuit Court of Appeals has the power to enter a final decree on the merits for the plaintiff; indeed, the opinions seem to indicate that no such power exists. Thus in *Ex parte National Enameling Co., supra,* Mr. Justice Brewer (interpreting *Smith v. Vulcan Iron Works, supra,* and citing *Mast, Foos & Co. v. Stover M'f'g Co.,* 177 U. S. 485, 494-495), said (p. 163):

> "But nowhere in the opinion is it intimated that the plaintiff was entitled to take any cross appeal or to obtain the final decree in the appellate court. * * *"

The Court, in commenting on the statute allowing an appeal from an interlocutory order or decree granting or continuing an injunction, stated further (p. 162):

> "Obviously that which is contemplated is a review of the interlocutory order, and of that only. It was not intended that the cause as a whole should be transferred to the appellate court prior to the final decree. The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered. It may be true, as alleged by petitioners, that 'it is of the utmost importance to all of the parties in said cause that there shall be the speediest possible adjudication by the United States Circuit Court of Appeals as to the validity of all of the claims of the aforesaid letters patent which are the subject matter thereof.' But it was not intended by this section to give to patent or other cases in which interlocutory decrees or orders were made any precedence. It is generally true that it is of importance to litigants that their cases be disposed of promptly, but other cases have the same right to early hearing. And the purpose of Congress in this legislation was that there be an immediate review of the interlocutory proceedings and not an advancement generally over other litigation."

In *Meccano, Ltd. v. John Wanamaker, supra*, the Court further stated (pp. 139-140):

> "We pass the question of practice whether this court under the doctrine of *Mast, Foos & Co. v. Stover*, 177 U. S. 488, may enter a decree for the plaintiff upon such an appeal as that now pending.

> *Mast, Foos & Co. v. Stover, supra,* was a case where the bill was dismissed and *no case has so far held that the plaintiff could obtain an affirmative decree.* * * * At best the rule in *Mast, Foos & Co. v. Stover, supra,* is limited to those cases in which the court can see that the whole issues can be disposed of at once without injustice to the parties." (Italics supplied.)

The situation which arose in *Smallwood v. Gallardo, supra,* as heretofore pointed out, and the ultimate disposition of that case by the Supreme Court seems to justify appellee in urging that this Court should direct a dismissal of the bill. See *Gallardo v. Santini Co.*, 275 U. S. 62.

Since Section 3224, *Revised Statutes,* and Section 21 (a) of the *Agricultural Adjustment Act,* as amended, have removed the jurisdiction of the courts to restrain the collection of *any tax*, and since Section 274D of the *Judicial Code,* as amended by Section 405 of the *Revenue Act of 1935*, and said Section 21 (a), *supra,* have removed any power which the court may have had to grant declaratory relief, the bill should be dismissed. Such action was taken by the Circuit Court of Appeals for the Tenth Circuit in *Alexander v. Mid-Continent Petroleum Corp.*, 51 F. (2d) 735.

V.

THE INJUNCTION PENDING APPEAL SHOULD BE DISSOLVED FORTHWITH

Appellant devotes the greater portion of its brief to an appeal to this Court to continue in effect the injunction granted pending appeal and urges that appellee will not be injured as a result thereof. There are various obvious reasons why such a request should not be given serious consideration. Section 129 of the *Judicial Code*, under which the jurisdiction of this Court is invoked, provides that appeals from interlocutory orders and decrees "shall take precedence in the appellate court." The purpose of such a provision becomes at once apparent. At best the remedy by injunction should never be permitted unless the right thereto is clear and distinct and unless the injury threatened is real and actual. In *Truly v. Wanzer*, 5 How. 140, the Supreme Court said (p. 142):

> "There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and commensurate remedy in damages. The right must be clear, the injury impending, and threatened so as to be averted only by the protecting preventive process of injunction."

In *Genet v. D. & H. Co.,* 122 N. Y. 505, the Court of Appeals of the State of New York said (p. 529):

> "Injury, material and actual, not fanciful or theoretical or merely possible, must be shown as the necessary or probable result of the action sought to be restrained."

In *Lutheran Church v. Maschop,* 10 N. J. Eq. 57, the Chancery Court of New Jersey, said (p. 62):

> "The court cannot grant an injunction to allay the fears and apprehensions of individuals; they must show the court that the acts against which they ask protection are not only threatened, but will in probability, be committed to their injury. * * *"

The prompt collection of the revenue is one of the most important functions of Government. Taxes are "the sole means by which sovereignties can maintain their existence." *Bank of Commerce v. Tennessee,* 161 U. S. 134, 146. Summary collection is necessary so that funds may be always available to defray public expense. As stated in *Bull v. United States,* 295 U. S. 247, 259, "taxes are the life-blood of government, and their prompt and certain availability an imperious need." To meet this need it is imperative that taxpayers be required to pay first and litigate later. As further stated in *Bull v. United States, supra* (p. 260)—

> "Thus the usual procedure for the recovery of debts is reversed in the field of taxation. *Payment precedes defense,* and the burden of proof, normally on the claimant, is shifted to the taxpayer." (Italics supplied.)

It is upon this principle that the whole scheme of Federal taxation rests, and has rested since the foundation of the Government. Beginning with *Cheatham v. United States, supra,* down through *Phillips v. Commissioner, supra* (p. 595), the Supreme Court has repeatedly held that "the right of the United States to collect its internal revenue by summary administrative proceedings has long been settled."

This same principle was earlier recognized in *Nichols v. United States*, 7 Wall. 122, when the Court said (pp. 129-130):

> "The prompt collection of the revenue, and its faithful application, is one of the most vital duties of government. Depending as the government does on its revenue to meet, not only its current expenses, but to pay the interest on its debt, it is of the utmost importance that it should be collected with despatch, and that the officers of the treasury should be able to make a reliable estimate of means, in order to meet liabilities. It would be difficult to do this, if the receipts from duties and internal taxes paid into the treasury, were liable to be taken out of it, on suits prosecuted in the Court of Claims for alleged errors and mistakes, concerning which the officers charged with the collection and disbursement of the revenue had received no information. Such a policy would be disastrous to the finances of the country, for, as there is no statute of limitations to bar these suits, it would be impossible to tell, in advance, how much money would be required to pay the judgments obtained on them, and the result would be, that the treasury estimates for any current year would be unreliable. To guard against such

> consequences, Congress has from time to time passed laws on the subject of the revenue, which not only provide for the manner of its collection, but also point out a way in which errors can be corrected. These laws constitute a *system*, which Congress has provided for the benefit of those persons who complain of illegal assessments of taxes and illegal exactions of duties. In the administration of the tariff laws, as we have seen, the Secretary of the Treasury decides what is due on a specific importation of goods, but if the importer is dissatisfied with this decision, he can contest the question in a suit against the collector, if, before he pays the duties, he tells the officers of the law, in writing, why he objects to their payment."

The forceful mandate of the Supreme Court in *Phillips v. Commissioner, supra*, will bear repetition here (p. 599):

> "It has already been shown that the right of the United States to exact *immediate payment* and to relegate the taxpayer to a suit for recovery is paramount. * * *." (Italics supplied.)

In spite of such convincing authority, appellant is urging that the Government cannot be injured by a continuance of the injunction pending a decision by the Supreme Court in *United States v. William M. Butler*, now pending before that Court. No greater injury can befall a sovereignty than to have stopped the flow of its "life-blood"—taxes. The *Butler* case is not a suit for injunction and does not involve the jurisdictional questions presented by this appeal. The decision in that case will not determine the rights of processor litigants to injunctive

relief through an invocation of the equity powers of the courts.

Available statistics of the Treasury Department disclose that approximately 37,000 processors file tax returns monthly with respect to the taxes imposed under the Agricultural Adjustment Act, as amended. Since the month of June of the present year upwards of 1,700 suits have been filed in the various District Courts for restraining the collection of processing taxes, in less than 1,100 of which restraining orders or preliminary injunctions have been granted, and from available records in the Treasury Department it is estimated that as of October 31, 1935, of the processing taxes effective under the Agricultural Adjustment Act, as amended, there was approximately $112,000,000 not being collected because collection has been enjoined by the courts. This presents a picture which shows that less than three per cent of the number of a major industry have appealed to the courts and obtained temporary advantages over the more than ninety-seven per cent of their competitors, who are paying their taxes and relying upon the refund provisions of the Agricultural Adjustment Act, as amended, for the recovery of such part of the taxes as they have borne, in the event the Act should be declared unconstitutional.

The gravity of such a situation cannot be lightly put aside. The fiscal operations of the Government function upon annual estimates and strictly budgetary requirements. To stop the steady flow of anticipated revenues is to seriously dislocate the national budgetary system.

The matters which must be considered by a court in connection with granting an injunction pending deter-

mination of an appeal were stated by Judge Learned Hand, then District Judge, in two cases in which he denied applications for such stays. In *Dryfoos v. Edwards,* 284 Fed. 596 (S.D. N.Y.), affirmed 251 U. S. 146, 264, the court denied a motion to enjoin the United States Attorney from enforcing penalties imposed under the provisions of the National Prohibition Act. It likewise denied the plaintiffs' application for a temporary injunction, saying (p. 603):

> "The Supreme Court is to hear argument upon the constitutionality of the War-Time Prohibition Act on Thursday next, and it is reasonable to suppose that an early decision will be reached. The damage done by an injunction meanwhile cannot be measured in money, as in the case of *Cotting v. Kansas City Stockyards* (C.C.) 82 Fed. 857. Here is a question of national public policy, of allowing the sale of what the constituted authorities apparently regard as injurious to the public, or to so much of it as they have the right to consider. *To annul their will, if only for a season, is to do an injury which is, to say the least, as irreparable, if the laws be valid, as to prevent the plaintiffs from selling intoxicants for the same period, if they are not.* In all the books we are told that to declare a statute unconstitutional we must be assured beyond question that it is such. A temporary stay now is a declaration for a time that it is unconstitutional; it is to dispense with the statute till the case be finally decided. Assuming that I may do so, there seems to be no proper reason for exercising the power." (Italics supplied.)

The language quoted seems to be a complete answer to the argument advanced by appellant to the effect that the continuing of the injunction could not result in harm either to the appellee or to the United States.

In *Cunard S. S. Co. v. Mellon*, 284 Fed. 890 (S.D. N.Y.), the court dismissed a bill which sought to enjoin the Secretary of the Treasury and others from enforcing the National Prohibition Act, and denied, for the most part, plaintiff's application for an injunction pending appeal. With respect to this feature of the case, the court said (p. 898):

> "It is easy to say, if one does not take seriously the opinion behind the amendment, that the United States will not suffer by the continuance of the status quo. But it is impossible to say so, if one does. I repeat what I said in *Dryfoos v. Edwards*, 284 Fed. 596, filed October 10, 1919, on a similar occasion. *The suspension of a law of the United States, especially a law in execution of a constitutional amendment, is of itself an irreparable injury, which no judge has the right to ignore.* The public purposes, which the law was intended to execute, have behind them the deep convictions of thousands of persons whose will should not be thwarted in what they conceive to be for the public good. No reparation is possible, if it is.
>
> "Furthermore, it is at best a delicate matter for a judge to tie the hands of other public officers in the execution of their duties as they understand them, and the books are full of admonitions against doing so, except in a very clear case. Here not only is the case not clear, but, so far as I can judge, the plaintiffs have no case." (Italics supplied.)

The Supreme Court of the United States has enunciated rules with regard to the issuance of stays pending appeal, which are entirely in accord with the views expressed by the Court in the foregoing cases. In *Virginia Ry v. United States,* 272 U. S. 658, the Court affirmed so much of a decree of a District Court as denied a temporary injunction and dismissed a bill which sought to enjoin a rate order of the Interstate Commerce Commission, and reversed so much of the decree as restrained enforcement of the order pending the determination of the main appeal. Mr. Justice Brandeis, writing the unanimous opinion of the Court, set forth the considerations which must guide a Court in considering the granting of a stay after an injunction has been denied, saying (p. 673):

> "An application to suspend the operation of the Commission's order pending an appeal from a final decree dismissing the bill on the merits calls for the exercise of discretion under circumstances *essentially different from those which obtain when the application for a stay is made prior to a hearing of the application for an interlocutory injunction*, or after the hearing thereon but before the decision. In the two latter classes of cases, if the bill seems to present to the court a serious question, the fact that irreparable injury may otherwise result to the plaintiff may, as an exercise of discretion, alone justify granting the temporary stay until there is an opportunity for adequate consideration of the matters involved. *But to justify a stay pending an appeal from a final decree refusing an injunction additional facts must be shown. For the decree creates a strong presumption of its own correctness and*

> *of the validity of the Commission's order.* This presumption ordinarily entitles defendant carriers and the public to the benefits which the order was intended to secure." (Italics supplied.)

In this appeal and seven allied cases, not only has Judge McCormick of the court below granted the motions of appellee to dissolve preliminary injunctions theretofore issued (R. 90), and has denied appellant's petitions for rehearing (R. 92-105), but Judge Cushman of the Western District of Washington in *Fisher Flouring Mills Co. v. Vierhus*, and six allied cases, on November 5, 1935, denied injunctions and dismissed the suits, and Judge Webster of the Eastern District of Washington in *Gibson Packing Co. v. Vierhus*, on August 31, 1935, denied an injunction, all in similar suits brought to enjoin the collection of processing taxes, and all of which are pending in this Court on appeal. This uniformity of decision creates an even stronger presumption of the correctness of the decree appealed from than existed in the *Virginia Ry* case, *supra*.

Furthermore, appellant has wholly failed to show any of the "additional facts" which the Supreme Court has said must be shown in order to justify a stay. It does not appear that any new or additional showing was presented to this Court showing why a stay should be granted, but that such application was submitted solely upon the record which the court below found insufficient to justify the continuing of the preliminary injunction.

If such injunction is continued in force, appellant is receiving in substance all that it seeks. In this, and every one of the processing tax appeals pending before this

Court in which injunctions pending appeal have been granted, the Government is in the position of having won empty victories. Despite the fact that the District Judges who have passed on these cases have held that the Court was without power to enjoin the collection of taxes, the hand of the Collector has been effectively stayed by the granting of injunctions pending appeal. In all such suits the Government is urging that the injunctions heretofore granted pending appeal, should be dissolved.

Of particular interest are the developments in *Washburn-Crosby Co. v. Nee, Collector*, in which, on October 3, 1935, the District Court for the Western District of Missouri dissolved an injunction in so far as the injunction theretofore granted referred to processing taxes which accrued subsequent to August 24, 1935. From such order, Washburn-Crosby Company appealed to the Circuit Court of Appeals for the Eighth Circuit, and immediately thereafter filed in the Supreme Court its petition for writ of certiorari. The petition for writ of certiorari presented to the Supreme Court for review, the questions of the constitutionality of the Agricultural Adjustment Act, as amended, and whether if such taxes are unconstitutional, the petitioner is entitled to injunctive relief against collection. Certiorari was denied on November 11, 1935.

For the reasons stated, it is urged that the injunction pending appeal should be dissolved forthwith.

VI.
CONCLUSION

The court below correctly sustained appellee's motion to dissolve the preliminary injunction. Because the court below is without jurisdiction to restrain or enjoin the collection of the taxes described in the bill, or to hear and/or determine the issues presented by said bill of complaint, it is urged that this case be remanded to the District Court with instructions to dismiss the bill.

Respectfully submitted,

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NOVEMBER, 1935.

APPENDIX "A"

Judicial Code:

SEC. 267. Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law. (U.S.C., Title 28, Sec. 384.)

SEC. 274D. [as added by the Act of June 14, 1934, c. 512, 48 Stat. 955, and amended by Sec. 405, Revenue Act of 1935; the amendatory matter is shown in italics.]

(1) (a) In cases of actual controversy (*except with respect to Federal taxes*), the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(b) *The amendment made by subsection (a) of this section shall apply to any proceeding now pending in any court of the United States.*

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not. (U.S.C., Title 28, Sec. 400.)

Revised Statutes:

SEC. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. (U.S.C., Title 26, Sec. 1543.)

APPENDIX "B"

STATUTES RELATING TO REMEDIES AT LAW

Agricultural Adjustment Act, c. 25, 48 Stat. 31:

SEC. 19. (a) The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States.

(b) [as further amended by Sec. 29 (a), Public No. 320, 74th Cong., approved August 24, 1935; the amendatory matter is shown in italics].

All provisions of law, including penalties, applicable with respect to the taxes imposed by Section 600 of the Revenue Act of 1926, and the provisions of section 626 of the Revenue Act of 1932, shall, in so far as applicable and not inconsistent with the provisions of this title, be applicable in respect of taxes imposed by this title: *Provided*, That the Secretary of the Treasury is authorized to permit postponement, for a period not exceeding *one hundred and eighty* days, of the payment of *not exceeding three-fourths of the amount of the* taxes covered by any return under this title, *but postponement of all taxes covered by returns under this title for a period not exceeding one hundred and eighty days may be permitted in cases in which the Secretary of the Treasury authorizes such taxes to be paid each month on the amount of the commodity marketed during the next preceding months.*

As amended by sec. 3 of Flannagan Amendment, Public No. 476, 73d Congress, approved June 26, 1934. The amendment substituted "one hundred and eighty" for "ninety."

SEC. 21. [added by Sec. 30, Public No. 320, 74th Cong., approved August 24, 1935.]

(a) No suit, action, or proceeding (including probate, administration, receivership, and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under this title on or after the date of the adoption of this amendment, or (2) of obtaining a declaratory judgment under the Federal Declaratory Judgments Act in connection with any such tax or such amount of any such interest or penalty. In probate, administration, receivership, bankruptcy, or other similar proceedings, the claim of the United States for any such tax or such amount of any such interest or penalty, in the amount assessed by the Commissioner of Internal Revenue, shall be allowed and ordered to be paid, but the right to claim the refund or credit thereof and to maintain such claim pursuant to the applicable provisions of law, including subsection (d) of this section, may be reserved in the court's order.

(b) The taxes imposed under this title, as determined, prescribed, proclaimed and made effective by the proclamations and certificates of the Secretary of Agriculture or of the President and by the regulations of the Secretary with the approval of the President prior to the date of the adoption of this amendment, are hereby legalized and ratified, and the assessment, levy, collection, and accrual of all such taxes (together with penalties and interest with respect thereto) prior to said date are hereby legalized and ratified and confirmed as fully to all intents

and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress. All such taxes which have accrued and remain unpaid on the date of the adoption of this amendment shall be assessed and collected pursuant to section 19, and to the provisions of law made applicable thereby. Nothing in this section shall be construed to import illegality to any act, determination, proclamation, certificate, or regulation of the Secretary of Agriculture or of the President done or made prior to the date of the adoption of this amendment.

(c) The making of rental and benefit payments under this title, prior to the date of the adoption of this amendment, as determined, prescribed, proclaimed and made effective by the proclamations of the Secretary of Agriculture or of the President or by regulations of the Secretary, and the initiation, if formally approved by the Secretary of Agriculture prior to such date of adjustment programs under section 8 (1) of this title, and the making of agreements with producers prior to such date, and the adoption of other voluntary methods prior to such date, by the Secretary of Agriculture under this title, and rental and benefit payments made pursuant thereto, are hereby legalized and ratified, and the making of all such agreements and payments, the initiation of such programs, and the adoption of all such methods prior to such date are hereby legalized, ratified, and confirmed as fully to all intents and purposes as if each such agreement, program, method, and payment had been specifically authorized and made effective and the rate and amount thereof fixed specifically by prior Act of Congress.

(d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

(2) In the event that any tax imposed by this title is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, there shall be refunded or credited to any person (not a processor or other person who paid the tax) who would have been entitled to a refund or credit pursuant to the provisions of subsections (a) and (b) of section 16, had the tax terminated by proclamation pursuant to the provisions of section 13, and in lieu thereof, a sum in an amount equivalent to the amount to which such person would have been entitled had the Act been valid and had the tax with respect to the particular commodity terminated immediately prior to the effective date of such holding of invalidity, subject, however, to the following condition: Such claimant shall establish to the satisfaction of the Commissioner, and the Commissioner shall find and declare of record, after due notice by the Commissioner to the claimant and opportunity for hearing, that the amount of the tax paid upon the processing of the commodity used in the floor stocks with respect to which the claim is made was included by the processor or other person who paid the tax in the price of such stocks (or of the material from which such stocks were made). In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. Notwithstanding any other provision of law: (1) no suit or proceeding for the recovery, recoupment, setoff, refund or credit of any tax imposed by this title, or of any penalty or interest, which is based

upon the invalidity of such tax by reason of any provision of the Constitution or by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefor (conforming to such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled thereto; (2) no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail.

(3) The District Courts of the United States shall have jurisdiction of cases to which this subsection applies, regardless of the amount in controversy, if such courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy.

(e) In connection with the establishment, by any claimant, of the facts required to be established in subsection (d) of this section, the Commissioner of Internal Revenue is hereby authorized, by any officer or employee of the Bureau of Internal Revenue, in-

cluding the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda, relative to any matter affecting the findings to be made by the Commissioner pursuant to subsection (d) of this section, to require the attendance of the claimant or of any officer or employee of the claimant, or the attendance of any other person having knowledge in the premises, and to take, or cause to be taken, his testimony with reference to any such matter, with power to administer oaths to such person or persons. It shall be lawful for the Commissioner, or any collector designated by him, to summon witnesses on behalf of the United States or of any claimant to appear before the Commissioner, or before any person designated by him, at a time and place named in the summons, and to produce such books, papers, correspondence, memoranda, or other records as the Commissioner may deem relevant or material, and to give testimony or answer interrogatories, under oath, relating to any matter affecting the findings to be made by the Commissioner pursuant to subsection (d) of this section. The provisions of Revised Statutes 3174 and of Revised Statutes 3175 shall be applicable with respect to any summons issued pursuant to the provisions of this subsection. Any witness summoned under this subsection shall be paid, by the party on whose behalf such witness was summoned, the same fees and mileage as are paid witnesses in the courts of the United States. All information obtained by the Commissioner pursuant to this subsection shall be available to the Secretary of Agriculture upon written request therefor. Such information shall be kept confidential by all officers and employees of the Department of Agriculture, and any such officer or

employee who violates this requirement shall, upon conviction, be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or both, and shall be removed from office.

(f) No refund, credit, or abatement shall be made or allowed of the amount of any tax, under section 15, or section 17, unless, within one year after the right to such refund, credit, or abatement has accrued, a claim for such refund, credit, or abatement (conforming to such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled to such refund, credit, or abatement, except that if the right to any such refund, credit, or abatement accrued prior to the date of the adoption of this amendment, then such one year period shall be computed from the date of this amendment. No interest shall be allowed or paid, or included in any judgment, with respect to any such claim for refund or credit.

(g) The provisions of section 3226, Revised Statutes, as amended, are hereby extended to apply to any suit for the recovery of any amount of any tax, penalty, or interest, which accrued, before, on, or after the date of the adoption of this amendment under this title (whether an overpayment or otherwise), and to any suit for the recovery of any amount of tax which results from an error in the computation of the tax or from duplicate payments of any tax, or any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title or any refund or credit to the processor of any tax paid by him with respect to articles exported pursuant to the provisions of section 317 of the Tariff Act of 1930.

Title XI of the *Revenue Act of 1926* contains the general administrative provisions applicable to miscellaneous taxes imposed by the Congress under the *Revenue Act of 1926,* including taxes imposed under Section 600 thereof.

Sections 19 (b) and 21 (g) of the *Agricultural Adjustment Act,* as amended, make applicable the following sections of the Revised Statutes:

> SEC. 3220. [As amended by Sec. 1111 of the Revenue Act of 1926, and by Sec. 619 (b) of the Revenue Act of 1928.]
>
> Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to the Congress at the beginning of each regular session of Congress of all transactions under this section. (U. S. C., Title 26, Secs. 1670, 1676.)

SEC. 3226. [As reenacted without change by Sec. 1113 (a) of the Revenue Act of 1926, and as amended by Sec. 1103 (a) of the Revenue Act of 1932.]

No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which suit or proceeding relates. (U. S. C., Title 26, Sec. 1672.)

SEC. 3228. [As amended by Sec. 1112 of the Revenue Act of 1926, by Sec. 619 (c) of the Revenue Act of 1928, and by Sec. 1106 (a) of the Revenue Act of 1932.]

(a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without au-

thority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund.

* * * * *

(U. S. C., Title 26, Sec. 1443.)

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 1101. The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this Act. (U. S. C., Title 26, Secs. 1049, 1350, 1691.)

H. Conference Rep. No. 1757, 74th Cong., 1st Sess., pp. 31-35 [to accompany H. R. 8492]:

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

Amendments nos. 106 and 114: The House bill dealt with refunds and credits of taxes and suits relating to the recovery of taxes paid or accrued under the Agricultural Adjustment Act in two separate provisions.

The first provision (sec. 21 (a)) related to suits with respect to taxes assessed, paid, collected, or accrued prior to the adoption of the amendatory act. In such cases no suit or proceeding was to be brought or maintained, for such taxes, nor was any court to allow any recoupment, set-off, or refund of, or credit or counter claim for, any such tax. Pursuant to a final judgment or decree entered prior to the adoption of the amendatory act, such claims could be allowed. The limitations herein discussed were not to relate to overpayments of tax resulting from an error in computation, duplicate payments of tax, or to certain funds and credits allowed by the Secretary in connection with processing of low value products, deliveries of products for charitable and other similar uses, or exportations. This provision was stricken out by Senate amendment no. 106 and the Senate matter relating to the same subject matter to it was inserted by Senate amendment no. 114.

The second provision of the House bill relating to refunds and credits of taxes was contained in section 21 (d) of that bill. This applied to refunds and credits of taxes accruing on or after the adoption of the amendatory act. Here the refund or credit was to be allowed or made only if the claimant established to the satisfaction of the Commissioner of Internal Revenue that the amount of tax claimed was not passed on to the buyer or that the claimant had repaid such amount to the buyer or ultimate purchaser. The refund or credit could also be made if the claimant filed with the Commissioner the consent of the ultimate purchaser to the allowance. In the case of the tax on hogs, the claimant had to establish to the satisfaction of the Commis-

sioner that the amount claimed was not deducted from the price to the producer or he had to file with the Commissioner the producer's consent to the allowance of the refund or credit. The provision contained exceptions relating to low-value products, products for charitable uses, and exportations similar to those in section 21 (a). This provision was stricken out by amendment no. 114 and the Senate matter corresponding to it was inserted in the new matter in that amendment.

In the matter proposed to be inserted by the Senate amendment, no distinction is made between claims and suits thereon on the basis of whether the taxes accrued before or after the adoption of the amendatory act. The conference agreement adopts this principle.

The Senate amendment does not deny access to the courts on back taxes as did the House bill. The conference agreement adopts this principle.

The Senate amendment required, in the case of both back taxes and future taxes, that the claimant (in order to have his claim prevail either before the Commissioner or before the court) establish that he had not passed the amount of tax claimed on to the purchaser or back to the producer. This provision embodies the doctrine that no taxpayer ought to be unjustly enriched by a return of the tax if in fact he had not borne it. The conference agreement adopts the substance of this provision and expands and clarifies it to require the claimant to show that no person under the claimant's control or in control of the claimant passed on or back to any person the amount of tax claimed, that such amount was not included in a charge or fee for processing, and

that the price paid by the claimant or any other person was not reduced by any part of such amount.

Under the Senate amendment, the facts required to be established to obtain the relief could be established before the Commissioner or before the court in any judicial proceeding relating to the claim. Under the Senate amendment the matter is determined on the basis of evidence taken by the court. Under the conference agreement a transcript of the hearing before the Commissioner is filed with and certified to the court and that record constitutes the evidence in the proceeding. No trial de novo on the facts by the court is provided for as is provided in the Senate amendment nor can judicial proceedings be brought in the absence of the prior administrative hearing and record. This provision applies to suits against the collector as well as against the United States and applies if the issue comes up in connection with any other suit involving the United States or the collector and the claimant.

The provisions of the conference agreement heretofore discussed do not apply to the following refunds or credits: (1) Refunds or credits with respect to the process of low value products under section 15 (a) of the act; (2) refunds or credits of tax on products for charitable use under 15 (c); (3) floor stocks tax refunds or credits under section 16; (4) refunds or credits of taxes on articles exported to foreign countries or to certain possessions under section 17 of the act; or (5) refunds or credits of tax on tobacco products for consumption beyond the jurisdiction of Federal revenue laws under section 317 of the Tariff Act of 1930.

The conference agreement strikes out a provision not contained in the House bill but inserted by the Senate amendment which required the establishment of the facts with respect to absorption of the tax by the taxpayer in Federal and State court suits for damages for the collection of the tax.

The conference agreement also inserts a provision relating to refunds and credits of floor-stocks taxes. The refunds or credits authorized under this provision are to be made to persons other than the processor or other person who paid the tax. The provision is applicable, for the most part, to wholesalers and retailers. If the processing tax is held invalid by reason of the Constitution, such persons having floor stocks on hand are entitled to the same refund or credit which they would be entitled to under Section 16 (a) and (b) of the act had the tax terminated by proclamation. The claimant must establish to the satisfaction of the Commissioner, after notice and opportunity for hearing, that the tax was included in the price to the claimant. In judicial proceedings relating to such claims the findings and record of the Commissioner constitute the evidence as in the case of suits by processors heretofore discussed.

The conference agreement also inserts a provision providing a special statute of limitations on suits for taxes based on the invalidity of the act. A claim must be filed with the Commissioner within 6 months after the tax has been finally held invalid. No suit can be begun before 1 year after the filing of such claim, unless the Commissioner renders a decision thereon within that time, or after 5 years after payment unless suit is begun within 2 years after disallowance of the part of the claim to which

the suit relates. The Commissioner is required to send notice of disallowance to the taxpayer within 90 days after disallowance.

The conference agreement also removes, in cases to which the subsection relates, the limitations of the present law on the jurisdiction of United States district courts under which they cannot entertain suits of this character against the United States, if the claim exceeds $10,000. The effect of the agreement is to authorize such courts to take jurisdiction, if otherwise within district court jurisdiction, regardless of the amount in controversy.

* * * * *

Amendment no. 108: Under the House bill, in probate, administration, bankruptcy, or other similar proceedings the claim of the United States for taxes under the Agricultural Adjustment Act and interest and penalties thereon was required to be allowed and ordered to be paid. The House bill permitted the reservation in the court's order, notwithstanding such allowance and payment, of the right to maintain a claim for credit or refund of such amount and suit thereon. In such cases the claim and suit were reserved for disposition according to the provisions of law made applicable thereto by section 19 of the Agricultural Adjustment Act. This amendment broadens the provision to include all applicable provisions of law including those discussed in connection with amendments nos. 106 and 114. The House recedes.

* * * * *

Amendment no. 111: The House bill legalized and ratified taxes imposed under the Agricultural Adjustment Act prior to the adoption of the bill.

This amendment includes tax penalties and interest within the provision. The House recedes.

Amendment no. 112: The House bill, in providing for legalization and ratification of taxes imposed under the act, states that they shall be validated as fully as if each such tax had been specifically fixed by Congress on May 12, 1933 (the date of the enactment of the original Agricultural Adjustment Act). This amendment strikes out the specific date, May 12, 1933, and makes the provision read "by prior act." The effect of the amendment is to make this legislation and ratification effective as if there had been in existence, immediately prior to the occurrence of the particular action ratified and legalized, an act of Congress authorizing such action. The House recedes.

Amendment no. 113: This amendment legalizes and ratifies all rental and benefit payments, all agreements with producers, and the adoption of other voluntary methods, prior to the date of the amendment. The legalization and ratification is made effective as if there had been in existence, immediately prior to the taking of the particular action ratified and legalized, an act of Congress authorizing such action. The House recedes with an amendment including within the types of action legalized and ratified the initiation, if formally approved by the Secretary of Agriculture prior to the date of the adoption of the amendment, of adjustment programs under section 8 (1) of the Agricultural Adjustment Act.

Amendment no. 115: This amendment authorizes the Commissioner of Internal Revenue or his agents designated for the purpose, in connection with the establishment, by any claimant, of the

facts required to be established by Senate amendment no. 114 as a prerequisite to obtaining any recovery, recoupment, set-off, refund, or credit, to examine books, papers, records, or memoranda bearing upon such facts, to require the attendance of the claimant or any officer or employee of the claimant or any other person having knowledge in the premises, and to take their testimony, with the power to administer oaths. The information thus obtained by the Commissioner is to be made available to the Secretary of Agriculture upon written request therefor; but must be kept confidential by the Department of Agriculture. Penalty is provided for violation of this requirement by any officer or employee of the Department. There was no comparable provision in the House bill. The conference agreement retains the substance of the Senate amendment with an additional provision specifically authorizing the Commissioner or any collector designated by him to summon witnesses on behalf of the United States or any claimant, to appear and produce books, papers, correspondence, memoranda, or other records deemed relevant or material by the Commissioner, and give testimony or answer interrogatories. The provisions of Revised Statutes 4174 and 4175, relating to service of summons and proceedings upon failure to obey a summons, are made applicable to any summons issued under the subsection, and witnesses summoned are to be paid the same fees and mileage as are paid witnesses in the courts of the United States.

Amendment no. 117: This amendment is designed to make the statutory period for filing claims for refund or credit of the amount of any tax under section 15 or 17 of the Agricultural Adjust-

ment Act (relating to exceptions, compensating taxes, and exportations) applicable to an abatement of tax under such sections. The House recedes.

Amendment no. 118: Under the House bill the provisions of the subsection fixing the statutory period for refunds or credits applied to refunds or credits under section 16 of the Agricultural Adjustment Act (relating to floor stocks). In view of the action on amendment no. 99 which provides the statutory period for refunds or credits under section 16, the House recedes.

Amendment no. 119: The House bill extended the provisions of section 3226 of the Revised Statutes, as amended (which requires the filing of claims for refund or credit with the Commissioner of Internal Revenue and fixes a period of limitation on suits), to apply to any suit to recover taxes which accrued under the Agricultural Adjustment Act on or after the date of adoption of the amendment, and to any suit for recovery of any amount of tax which results from an error in the computation of the tax or from duplicate payments of any tax. The Senate amendment extends the application of section 3226 to include suits for any penalty or interest, as well as tax, which accrued before, on, or after the date of the adoption of the amendment and to refunds or credits authorized in the case of certain exempted transactions and in the case of certain exportations and floor stocks. The House recedes with clarifying amendments. (Italics supplied.)

Cong. Rec., Vol. 79, No. 167, pp. 13475-13476:

[Mr. Jones, Chairman of the House Committee on Agriculture, submitted the Conference Report to the House of Representatives, which was agreed to by

the House on August 13, 1935. In presenting the report to the House, Mr. Jones made the following statement in explanation of the action of the conferees:]

Mr. Jones: Mr. Speaker, this bill is largely in the form in which the House passed it. It is true there are 163 amendments. A great many of these amendments are largely changes in section numbers and formal changes that do not amount to a great deal. They are all fully explained in the conference report.

In its essential parts the bill is as it passed the House. One exception is the provision for suits. The bill as it passed the House placed a ban on all suits on the part of processors for the recovery of taxes heretofore collected in the event the taxes should be held illegal. The Senate adopted an amendment which permitted taxes to be recovered in suits by any processor in the event that taxes should be held illegal. A compromise was adopted. The Senate amendment made no provision whatever for recovery on the part of wholesalers or retailers on stocks on hand which had absorbed the taxes. A compromise was reached which provides that the wholesaler and retailers may recover on stocks which they have on hand unsold at the time the tax becomes ineffective. It then permits the processors to file claims for refund with the Commissioner of Internal Revenue who conducts hearings and makes findings of fact. In order to recover the processors must show that they neither passed the tax on in the price of the product which they sold nor charged it back to the farmer in the form of a reduced price which they paid him for his article. They may then file suit for recovery of the taxes, but the commis-

sioners' hearings and findings become the record in the case. This, in a general way, is the explanation of the suit provision.

Cong. Rec., Vol. 79, No. 169, pp. 13700, 13701, 13702:

[Senator Smith, Chairman of the Senate Committee on Agriculture and Forestry, submitted the Conference Report to the Senate, which was agreed to by the Senate on August 15, 1935. In the discussion in the Senate prior to the final vote of agreement accepting the Conference Report, the following pertinent statements were made by various members of the Senate:]

Mr. Borah: Mr. President, before the report is acted upon, I desire to see if I understand it.

Referring to amendment no. 114, the House has receded from its disagreement to the Senate amendment, and has agreed to it with an amendment, as follows:

(d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counterclaim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax) unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the

article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court—

And so forth.

The question with me is, What is the modus operandi by which the party desiring to recover finally reaches court in case he desires to go to court?

Mr. Smith: As it was discussed by the legal representatives, both of the Department and those who claim that distinction on the committee, wherever one had a claim, according to the custom under the law as it now prevails in reference to a rebate or refund of a tax, he goes before the internal-revenue collector and states his case. After the matter was discussed at some length, the members of the committee decided not to restrict the plaintiff to matters upon which the Commissioner either allowed or rejected the claims, but the whole record as it appeared before him should be the basis of the claimant going into court. He can reject any finding of the Commissioner, unless it is in accordance with his claim, and go before a court of competent jurisdiction, and, upon the record as it is set up, he can prosecute his case.

* * * * *

Mr. King: Mr. President, I join in the request of the Senator from Idaho. May I call the attention of the Senator from Idaho to this language in the section to which the Senator referred, namely:

> Neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on—

This is the point—

> any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing—

And so forth. Which would mean that if the Government had, as he believed, illegally collected a thousand dollars, and he demonstrated that he had not passed on any part of it except $1, he then would be denied relief under the interpretation of the language.

* * * * *

Mr. George: Mr. President, I desire to be heard on that point.

I do not wish to have an incorrect interpretation placed upon the bill. The interpretation placed upon it by the Senator from Utah is not correct. At first blush, it seemed to me to be the proper interpretation; and when we were considering this matter originally in the Senate that was my conclusion. A careful reading of the language, however, will disclose that the interpretation is not correct.

If the Senator will bear with me, I will read:

No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counterclaim be allowed for, any amount of any tax—

The "amount of any tax" refers back to that original subject, and it is not subject to the interpretation which seems to be about to be accepted here. *I wish the RECORD to show what is the correct interpretation of the language as I construe it.*

* * * * *

Mr. President, the amendment is not all that I desire, but I believe it preserves at least some legal rights of the claimant to a refund or to a credit for a tax illegally collected or a tax improperly collected. In my judgment, "the amount of any tax" refers back to the original language at the beginning of this particular section.

I desire to call attention to the fact that this is not a provision for authority for the claimant to sue. It is no grant of the right to sue. It is nothing but a limitation upon that right. In my judgment, it would not be strictly or technically construed by any court. It would be given a fair and a liberal interpretation. Therefore, if the claimant should make out a just case and secure a judgment of $500 for taxes illegally collected, I cannot believe the court would then deny a judgment simply because the claimant had passed on a small amount of the $500 to the ultimate consumer, because I think it would be construed as it properly is—merely a limitation upon a right otherwise existing and merely a condition.

I myself wish very much that the broad, unrestricted right of the claimant to come into court

might have been given without so many hedging phrases and so much language; but, looking to what the court would ultimately do with this section, I have no doubt that a substantial right is given. It is true that the claim must first be made before the Commissioner of Internal Revenue, but that is true now in many instances. That was true under the revenue act which permitted a claim for refund for unsold automobile parts, and it is also true even in the administration of veterans' legislation. Before any suit may be commenced or maintained upon a policy of insurance, the veteran must make out his case and obtain an affirmative approval or disapproval of his alleged cause of action by the Administrator of Veterans' Affairs.

Properly construed, the real purpose, whether it be always properly administered, is to give the Government opportunity to settle a just case when all of the facts have been made to appear. Although the Commissioner of Internal Revenue is a political officer, of course, and generally is disposed to construe an act favorably to the Government, nevertheless, in many instances the facts are found properly, correctly, and justly, and the Government is enabled to make refunds without the necessity of further court action upon the record actually made up. (Italics supplied.)

APPENDIX "C"

(T. D. 4518)

Processing and other taxes with respect to hogs under the Agricultural Adjustment Act.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF
INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Section 9(a), Agricultural Adjustment Act, provides in part:

> When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. * * *

PAR. B. The proclamation of the Secretary of Agriculture, dated August 17, 1933, provides:

> I, HENRY A. WALLACE, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the Agricultural Adjustment Act, approved May 12, 1933, have determined and hereby proclaim that benefit payments are to be made with respect to hogs, a basic agricultural commodity.

PAR. C. Section 10(c), Agricultural Adjustment Act, provides:

> The Secretary of Agriculture is authorized, with the approval of the President, to make such regula-

tions with the force and effect of law as may be necessary to carry out the powers vested in him by this title, including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

PAR. D. Section 9(d)7, Agricultural Adjustment Act, as amended, provides:

> In the case of any other commodity, the term "processing" means any manufacturing or other processing involving a change in the form of the commodity or its preparation for distribution or use, as defined by regulations of the Secretary of Agriculture; and in prescribing such regulations the Secretary shall give due weight to the customs of the industry.

PAR. E. The regulations, with respect to the processing tax on hogs, made by the Secretary of Agriculture, with the approval of the President, dated October 18, 1933, as revised, and, in part, superseded by regulations made by the Secretary of Agriculture, with the approval of the President, dated October 29, 1934, provide:

> (1) I do hereby ascertain and prescribe that for the purposes of said Act the first marketing year for hogs shall begin November 5, 1933.
>
> I do hereby find that the rate of tax as of November 5, 1933, which equals the difference between the current average farm price for hogs and the

fair exchange value of hogs, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture, will cause such reduction in the quantity of hogs, or products thereof, domestically consumed as to result in the accumulation of surplus stocks of hogs, or products thereof, or in the depression of the farm price of hogs. I do accordingly hereby determine: As of November 5, 1933, that the rate of the processing tax on the first domestic processing of hogs shall be fifty (50) cents per hundred (100) weight, live weight; as of December 1, 1933, that the rate of the processing tax on the first domestic processing of hogs shall be one (1) dollar per hundred (100) weight, live weight; as of February 1, 1934, that the rate of the processing tax on the first domestic processing of hogs shall be one (1) dollar fifty (50) cents per hundred (100) weight, live weight; as of March 1, 1934, that the rate of the processing tax on the first domestic processing of hogs shall be two (2) dollars twenty-five (25) cents per hundred (100) weight, live weight, which said rate, as of the effective date thereof, will prevent the accumulation of surplus stocks and depression of the farm price of hogs.

I. Definitions.

(2) The following terms, as used in these regulations, shall have the meanings hereby assigned to them:

First domestic processing.—The term "first domestic processing" means the slaughter of hogs for market; except that (*a*) in the case of a producer or feeder who shall distribute the carcass or any edible hog product directly to a consumer, the term

"first domestic processing" means the preparation of the carcass or any edible hog product for sale, transfer, or exchange or for use by the consumer, and only the edible product or products so sold, transferred, exchanged or distributed by or for the producer or feeder shall be deemed to have been processed, and (*b*) in the case of a producer or feeder who shall sell, transfer, or exchange any carcass or edible hog product (1) to any person engaged in reselling, rehandling, cutting, trimming, rendering, or otherwise preparing such products for market (including, but not limited to, retailers, wholesalers, distributors, butchers, packers, factors, or commission merchants), or (2) to any restaurant, hotel, club, hospital, institution, or establishment of similar kind or character, the term "first domestic processing" means the initial act of such person, restaurant, hotel, club, hospital, institution, or establishment which involves the preparation of the carcass or any edible hog product for further distribution or use.

Slaughtering.—Slaughtering is the actual killing of hogs. Hogs condemned by an authorized Federal, State, county, or municipal inspector as being totally unfit for human food shall not be considered hogs slaughtered for market within the mean of these regulations.

Live weight.—Live weight is the weight of the live animal at the time of slaughter. However, the actual weight at the time of purchase may be used as the live weight in the meaning of these regulations, provided the hogs are slaughtered within three (3) days after the date of such weighing. When any primal part or edible portion of the vis-

cera has been condemned as a result of the first postmortem inspection made prior to the cutting of the carcass into parts, by any Federal, State, county, or municipal authority, as being unfit for human food, the equivalent live weight of such condemned part shall not be included in the live weight subject to the processing tax; provided, however, that the processor of such condemned part shall show by his affidavit the actual weight thereof; the actual weight so shown shall be restored to a live-weight basis by using the conversion factor prescribed for such part in the tables of conversion factors herein, except that the conversion factor for the edible portion of condemned viscera sets shall be 50 per cent.

Carcass.—Carcass is the animal body after the blood, hair, toes, and viscera have been removed.

Wiltshire.—A Wiltshire is half of a hog carcass with head, feet, and part of jowl removed, consisting of the ham, side, and shoulder in one piece.

Cumberland.—A Cumberland is similar to a Wiltshire except that the ham is removed.

Cuts.—Cuts are the various parts into which the hog carcass is divided in the operation of converting the carcass into products which go into commercial trade.

Ham.—A ham is that part of the hog carcass which consists of the hind leg extending from the foot to the backbone (not inclusive). It may include part or all of the hock and part or all of the pelvic bone.

Regular ham.—A regular ham is a ham, either long-cut or short-cut, from which skin has not been

removed. This classification includes such styles as American, English, Italian, and all other varieties of unskinned hams.

Skinned ham.—A skinned ham is a ham, either long-cut or short-cut, of any description from which all or part of the skin has been removed.

Boneless ham.—A boneless ham is a ham of any description from which all of the bone has been removed.

Rough shoulder.—A rough shoulder is that part of the hog carcass extending from near the third rib to but not including the jowl, with the foot removed.

Regular shoulder.—A regular shoulder is a rough shoulder with neck and rib bones removed. This classification includes such styles as English, New York, New Orleans, and all other varieties of unskinned shoulders.

Skinned shoulder.—A skinned shoulder is a regular shoulder from which part or all of the skin has been removed.

Picnic.—A picnic is a cut comprising about the lower two-thirds of the shoulder. This classification includes regular shank, short shank, shankless, and skinned or unskinned picnics; and also shanks (sometimes called hocks) which may have been previously separated.

Boneless picnic.—A boneless picnic is a picnic of any description from which all of the bone has been removed.

Shoulder butt.—A shoulder butt is the top portion of the shoulder which is removed from the shoulder in making a picnic.

Butt.—The butt is the portion of the shoulder butt after removal of plate. This classification includes such styles as Boston, Milwaukee, Buffalo, and all other types of butts except boneless butts.

Boneless butt.—A boneless butt is a Boston or other style butt with bone removed.

Plate.—A plate is the fat portion of the shoulder butt.

Rough short ribs.—Rough short ribs are the middle portion of the hog carcass after removal of the hams and shoulders.

Short ribs.—Short ribs are the rough short ribs with the backbone and tenderloin removed.

Extra short ribs.—Extra short ribs are the rough short ribs with the loin removed.

Short clears.—Short clears are the rough short ribs with the backbone, spareribs, and tenderloin removed.

Extra short clears.—Extra short clears are the rough short ribs with the loin and spareribs removed.

Rib back.—The rib back is the upper half of the rough side with the tenderloin removed.

Pork loin.—Pork loin is that portion of the side of the carcass from which the belly and fat back have been removed; it usually contains the backbone, back ribs, and tenderloin and has but a small amount of fat on the outside. This classification, however, includes bladeless loin, tenderloin, and boneless loin, either domestic trim or Canadian style.

Fat back.—Fat back is that portion of the side which remains after removal of the pork loin and

belly. This classification includes skinned, unskinned, and long-cut and short-cut fat backs.

Spareribs.—Spareribs are the meaty ribs taken from the side in half or whole sheets.

Belly (when cured and smoked, commonly known as bacon)—

Dry salt trim (commonly known as "belly D. S. trim"): The roughly trimmed portion of the rough side remaining after removal of loin and fat backs and including or excluding spareribs, whether or not put down in dry salt.

Pickle trim (commonly known as "belly S. P. trim"): Same as above except trimmed reasonably square. This classification includes English style bellies and all belly cuts not otherwise described, including fancy trimmed bellies and briskets.

Briskets.—Briskets are pieces removed from the shoulder ends of bellies.

Jowl.—A jowl is the cheek and part of the neck. This classification includes jowl butts and bacon squares.

Head.—The head is the hog skull and jawbones with attached organs and fleshy covering, except the jowls.

Trimmings.—The trimmings are the boneless meat of all degrees of lean and fat derived from any portion of the hog carcass which has lost its identity as a major cut.

Foot.—The foot is that part of the front or hind leg from approximately the knee joint downward.

Neck bones.—Neck bones are bones of the neck with adhering flesh after removal from the rough shoulder.

Cheek meat and temple meat.—Cheek meat and temple meat consist of the fleshy covering of the upper jawbone and forepart of skull.

Lard.—Lard is edible hog fat after rendering. This includes refined and unrefined lard, neutral lard, and leaf lard. Unrendered fats should be converted to a lard yield basis.

Viscera.—Viscera are the intestines, with their contents, and vital organs of the body cavities, with their attached fats.

Edible offal.—Edible offal are the various edible products obtained from hog viscera and hog heads; also the hog feet and tails.

Inedible offal.—Inedible offal are the various inedible products obtained in the slaughter of hogs, consisting largely of blood, hair, bristles, parts of the viscera and their contents, and skin.

Tankage.—Tankage is the residue from rendering or cooking operations in the production of lard or grease from hog products.

Fresh, chilled, or green meat.—Fresh, chilled, or green meat is meat which has not been subjected to any preservative treatment, such as cooking, drying, freezing, or the use of curing agents.

Frozen meat.—Frozen meat is fresh meat held below the freezing temperature of such meat.

In cure.—In cure (usually called by the trade "in process of cure") is meat under treatment of curing

or preservative agents. This includes all meat packed as barreled pork.

Cured meat.—Cured meat is meat which has gone through a complete curing or preservative process.

Put down or pack.—To place meat in cure.

Smoked meat.—Smoked meat is meat exposed to a smoking treatment.

Cooked meat.—Cooked meat is meat exposed to a cooking treatment.

Canned meat.—Canned meat is meat cooked and packed in hermetically sealed metal or glass containers.

Dried meat.—Dried meat is meat preserved by a drying treatment.

General.—Barreled pork is to be classified according to the cut from which derived, and reported on basis of put-down green weight.

Sausage.—Sausage is chopped or ground meat composed wholly or in chief value from pork and seasoned. It may be in bulk, or stuffed in animal casings, or packed in other containers.

Fresh sausage.—Fresh sausage is sausage made of fresh or frozen meat and not subjected to a treatment of smoking, cooking, or drying.

Smoked and/or cooked sausage.—Smoked and/or cooked sausage is sausage made from fresh, frozen, or cured meat and further treated by smoking or cooking, or both, but not treated by drying.

Dried sausage.—Dried sausage is sausage made from fresh, frozen or cured meat and further treated by drying. It may be further treated by

smoking or cooking, or both. It includes all cervelats, salamis, and mettwursts of Italian, German, Polish, or other styles.

Luncheon meats.—Luncheon meats are mixtures prepared for eating without further cooking and include such articles as pork loaf, sandwich meat, head cheese, souse, and similar combinations. This classification does not include canned loins or canned tongue; whole or part pieces of canned ham, which are derived from hams; canned deviled ham, canned spiced ham, and canned spiced luncheon meats which are derived from trimmings. They are to be considered as cooked products of the cuts from which derived and are subject to the conversion factor prescribed therefor.

Feeder.—The term "feeder" means any individual or individuals, actively and regularly engaged in the fattening of hogs for market, or in farming operations, a part of which is the fattening of hogs, except retailers, wholesalers, or distributors of meat, butchers, abattoirs, slaughterhouses, packers, factors, or commission merchants.

Producer.—The term "producer" means the individual or individuals who own the hog at the time of farrowing.

Preparation of the carcass or any edible hog product.—The term "preparation of the carcass or any edible hog product" means the preparation, conversion, and/or delivery of any hog carcass or any edible hog product, including, but not limited to, any operation connected with receiving, handling, storing, wrapping, cutting, trimming, and/or rendering any hog carcass or any edible hog product.

Primal parts.—The term "primal parts" means the commercially so-designated sections, cuts, or parts of the dressed carcass (including, but not limited to, such parts as shoulders, hams, bellies, tongues, livers, and heads) before they have been cut, shredded, or otherwise subdivided as a preliminary to use in the manufacture of meat products.

Green weight.—The term "green weight" means the weight of any hog product in its fresh state, after chilling and before any manufacturing operation (including, but not limited to, such operations as freezing, curing, cooking, or drying) has been performed.

II. Conversion Factors.

(3) I do hereby establish the following conversion factors for articles processed from hogs, to determine the amount of tax imposed or refunds to be made with respect thereto:

A. The following table of conversion factors fixes the percentage of the per pound processing tax on hogs with respect to a pound of the following articles processed wholly or in chief value from hogs:

Article.	Conversion factor. Fresh, frozen, in cure, or barreled pork.	Cured. Dry salt.	Cured. Pickle.	Smoked.	Cooked, dried, or canned.
Carcass:	Per Cent	Per Cent	Per Cent	Per Cent	Per Cent
Head and leaf included	132	132	125	140	178
Head included, leaf removed	134	134	127	142	181
Head removed, leaf included	138	138	131	146	186
Head and leaf removed	139	139	132	147	188
Wiltshire side	145	145	138	154	196
Cumberland side	132	132	125	140	178
Regular ham	194	194	184	206	242
Skinned ham	219	219	205	229	292
Boneless ham	252	252	239	267	340

Article.	Conversion factor. Fresh, frozen, in cure, or barreled pork.	Cured.		Smoked.	Cooked, dried, or canned.
		Dry salt.	Pickle.		
Carcass:	Per Cent	Per Cent	Per Cent	Per Cent	Per Cent
Rough shoulder	85	85	81	90	115
Regular shoulder	89	89	86	94	120
Skinned shoulder	94	94	89	100	127
Picnic	76	76	72	81	103
Boneless picnic	99	99	95	105	129
Shoulder butt and butt	123	123	116	130	166
Boneless butt	179	179	170	190	242
Plate	80	80	76	85	108
Rough short ribs, short ribs, extra short ribs, short clears, extra short clears, rib back	135	135	129	143	182
Pork loin	216	216	205	229	292
Fat back	87	87	83	92	117
Spareribs	66	66	63	70	89
Belly D. S. trim	124	124	118	131	167
Belly S. P. trim, briskets	180	180	171	191	243
Jowl	80	80	76	85	108
Head	60	60	58	63	81
Trimmings	80	80	76	85	108
Neck bones	19	19	18	20	26
Feet	19	19	18	20	26
Tails	44	44	42	47	59
Livers, hearts, and kidneys	44	44	42	47	59
Snouts, ears, lips, and miscellaneous edible offal	22	22	21	23	30
Cheek meat	88	88	84	94	118
Brains	44	44	42	47	59
Tongues	166	166	157	176	224
Lard	110	.....	.....	.....	.....
Pork sausage	80	80	76	85	112
Dried sausage (including cervelats and salamis)	60	60	57	63.75	84
Luncheon meats (including pork loaf, head cheese, souse, and sandwich meat)	76	76	72.20	81.75	106.40
Inedible offal	0	0	0	0	0

B. In the event that any taxpayer or person entitled to a refund establishes that any or all of the types of sausages, processed wholly or in chief value from hogs, on which a tax is imposed, or which may be the subject of a claim for refund, which are included in the above list, contain more or less pork, green weight, than represented by the listed conversion factor, then the conversion factor, for each pound of pork which said sausages are established to contain, shall be the following percentage of the per pound processing tax on hogs:

(a) If fresh meat, 80 per cent.

(b) If cured, dry salt meat, 80 per cent.

(c) If cured, sweet pickle meat, 76 per cent.

(d) If smoked meat, 85 per cent.

(e) If cooked, dried or canned meat, 112 per cent.

C. The following table of conversion factors fixes the percentage of the per pound processing tax on hogs with respect to a pound of the following hog products sold directly to the consumer by the producer or feeder of the hogs:

Article.	Conversion factor. Per cent.
Dressed carcass	132
Lard	110
All fresh, frozen, in cure, or barreled pork, dry salt-cured pork	132
All pickle-cured pork	125
All smoked pork	140
All cooked, dried, or canned pork	178

D. When any edible product for which no specific conversion factor is prescribed in these regulations (1) is wholly or partly of pork and is subject to

the payment of a compensating tax or with respect to which a refund of tax is allowable upon exportation or with respect to which a credit or refund of tax is allowable by reason of the delivery thereof for charitable distribution or use, or (2) is wholly or in chief value of pork and is subject to the payment of a floor stocks tax or with respect to which a credit or refund of tax upon floor stocks is allowable, such tax shall be paid or such credit or refund shall be allowed with respect to the said product on the amount of the pork content thereof, according to the conversion factor prescribed for each cut from which the pork contained in such product was derived.

III. Exemptions.

(4) In my judgment, the imposition of the processing tax upon hogs processed by the producer thereof who sells directly to or exchanges directly with the consumer not more than three hundred (300) pounds of the products derived therefrom, during any marketing year, is unnecessary to effectuate the declared policy of the Act. Accordingly, I do hereby exempt from the processing tax, hogs processed by the producer thereof who sells directly to or exchanges directly with the consumer not more than three hundred (300) pounds of the products derived therefrom, during any marketing year: *Provided, however,* That if the producer processes hogs produced by him and sells directly to or exchanges directly with the consumer during any marketing year, products derived therefrom in excess of three hundred (300) pounds, but does not sell or exchange in excess of one thousand (1,000) pounds, he shall be entitled to the foregoing exemption, but shall pay the processing tax on the excess

above three hundred (300) pounds, restored to a live-weight basis by use of the conversion factors prescribed as provided herein in paragraphs C and D under the heading "II. Conversion factors." *Provided further,* That if the producer processes hogs produced by him and sells or exchanges more than one thousand (1,000) pounds of the products derived therefrom, during any marketing year, he shall not be entitled to the foregoing exemption.

When hogs are owned on a share basis, the foregoing exemption shall be apportioned between the joint owners thereof on the basis of their respective shares.

When a producer has processed hogs produced by him and has sold, during the marketing year, products derived therefrom in excess of one thousand (1,000) pounds, and has failed to pay the processing tax on hogs for the month in which the said hogs were processed, due to a reliance on the foregoing exemption, then he shall be liable for the processing tax upon all of the hogs, live weight, theretofore processed, with respect to which no processing tax has been paid, as for the month in which the hog products sold exceeded one thousand (1,000) pounds, at the rate of tax in effect on the date of processing. To restore the hog products sold to a live-weight basis, the producer shall use the conversion factors prescribed as provided herein in paragraphs C and D under the heading "II. Conversion factors."

When the hogs are processed by the producer, it will not be necessary for the producer to furnish an affidavit, or witnessed statement, upon the processing of hogs for sale or exchange by him, of the hog products sold or exchanged, to the extent of the

foregoing exemption and tolerance allowance, and/or upon the processing of hogs by or for the producer thereof for consumption by his own family, employees, or household, of the hogs slaughtered for that purpose, provided the producer keeps a written record showing the date on which the hogs were slaughtered; the number of hogs slaughtered; the live weight of the hogs slaughtered (or where not practicable, an estimate of the live weight of the hogs and the basis used in arriving at this estimate); the hog products sold, the weight thereof, the price paid therefor, the date of the sale, and (where practicable) the name and address of the person to whom sold; the hog products consumed by his own family, employees, or household and the actual or estimated weight thereof; and the live weight of hogs processed by or for the producer thereof, his own family, employees, or household, together with the name and address of the processor thereof.

The provisions of these regulations shall take effect as of November 1, 1934.

PAR. F. Section 19(a), Agricultural Adjustment Act, provides:

The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States.

PAR. G. Section 15(e) of the Agricultural Adjustment Act, as amended, provides in part:

During any period for which a processing tax is in effect with respect to any commodity there shall

be levied, assessed, collected, and paid upon any article processed or manufactured wholly or partly from such commodity and imported into the United States or any possession thereof to which this title applies, from any foreign country or from any possession of the United States to which this title does not apply, whether imported as merchandise, or as a container of merchandise, or otherwise, a compensating tax equal to the amount of the processing tax in effect with respect to domestic processing of such commodity at the time of importation; * * *

PAR. H. Section 10(d), Agricultural Adjustment Act, provides:

> The Secretary of the Treasury is authorized to make such regulations as may be necessary to carry out the powers vested in him by this title.

PAR. I. Section 1101, Revenue Act of 1926, made applicable by section 19(b), Agricultural Adjustment Act, provides:

> The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this Act.

Pursuant to the above-quoted provisions and the provisions of the various internal revenue laws, the following regulations are hereby prescribed:

> ARTICLE 1. *General.—(a)* A processing tax on the first domestic processing of hogs became effective at the earliest moment of November 5, 1933. A compensating tax became effective with respect to all articles processed or manufactured *wholly or in chief value* from hogs, and imported on or after

November 5, 1933. A compensating tax became effective with respect to all articles processed or manufactured *wholly or partly* from hogs, and imported after 11.23 a.m., eastern standard time, May 9, 1934. See section 15(e) of the Agricultural Adjustment Act as amended by the Act approved May 9, 1934 (48 Stat., 670), quoted in paragraph G, above.

The present rate of processing tax is given in article 2 of these regulations. The present compensating tax on each pound of the various hog products is given in article 4 of these regulations.

(b) For regulations relating to the processing tax and compensating tax consult Regulations 81 and for regulations relating to exportation under section 17 of the Act consult Regulations 83, September, 1934, edition, which are general regulations under the Agricultural Adjustment Act, as amended. Regulations 81 and Regulations 83, September, 1934, edition, are supplemented by the regulations contained in this Treasury decision.

(c) With respect to hogs, and articles processed therefrom, the date, November 5, 1933, when the processing tax with respect to hogs first took effect, is the "effective date" as defined and used in Regulations 81 and Regulations 83, September, 1934, edition. See paragraph E(1), above, for the dates subsequent to November 5, 1933, when increased rates of processing tax became effective.

(d) The various definitions set forth in the regulations of the Secretary of Agriculture in paragraph E(2), above, are hereby made a part of these regulations.

ART. 2. *Processing tax.*—(A) The rate of processing tax on the first domestic processing of hogs, in force since the earliest moment of March 1, 1934, is $2.25 per hundredweight, live weight.

(B) Within the meaning of the term "first domestic processing of hogs" as defined in paragraph E(2) there are three classes of persons who may be liable for the processing tax on hogs, namely:

Class 1. A person, other than a producer or a feeder, who slaughters hogs for market;

Class 2. A person who receives, by sale, transfer, or exchange, from a producer or feeder the carcass of a hog, or any edible hog product, and who prepares such carcass or product for further distribution or use. As so used, the term "person" means any person engaged in reselling, rehandling, cutting, trimming, rendering, or otherwise preparing such product for market (including, but not limited to, retailers, wholesalers, distributors, butchers, packers, factors, or commission merchants), and includes any restaurant, hotel, club, hospital, institution, or establishment of similar kind or character; and

Class 3. A producer or feeder with respect to a hog carcass or other edible hog product sold directly to, or exchanged directly with, consumers.

The form prescribed for return of processing tax by a processor in class 1, is P. T. Form 4A; in class 2, P. T. Form 4B; and in class 3, P. T. Form 4X. Returns on these forms must be filed in duplicate with the collector for the district in which the principal place of business of the processor is located *on or before* the last day of the month following the month in which the processing is done. The

amount of tax shown to be due on each such return must be paid at the time when the return is filed, or if the time for payment be postponed, then at the time or times designated for payment in such postponement.

(C) *Processors in class 1.*—Each processor in class 1 (other than a producer or feeder) who slaughters hogs for market shall file for each calendar month a return on P. T. Form 4A in accordance with the instructions printed on the form and in accordance with these regulations. Such processor shall attach to and make a part of his return when filed, a statement, in duplicate, with respect to the parts of hogs condemned during the month, showing (1) the name of each such part, (2) the actual weight thereof, (3) the conversion factor applicable for determination of the equivalent live weight, and (4) the equivalent live weight of such part. For applicable conversion factors see paragraph E(3), above. Credit may be taken only for a primal part or edible portion of the viscera which has been condemned, as a result of the first postmortem inspection made prior to the cutting of the carcass into parts, by any Federal, State, county, or municipal authority, as being unfit for human food. See definition of live weight in paragraph E(2). If the viscera set of a hog is condemned and the weight of the edible portions thereof can not be ascertained by actual weighing, 2½ per cent of the weight of the live hog from which such viscera set was derived may be considered as the equivalent live weight of such edible portions.

Each processor in class 1 shall keep a record showing for each calendar month, (1) the number and live weight of hogs on hand at the beginning of the

month, (2) the number and live weight of hogs received during the month, (3) the number and live weight of hogs shipped or delivered during the month, (4) the number and live weight of hogs destroyed or otherwise disposed of during the month, (5) the number and live weight of hogs on hand at the end of the month, and (6) the number and live weight of hogs put in process during the month. The live weight must be ascertained by actual weighing on accurate scales and not by estimation. Such person shall also keep a record of the products of such processing, and preserve accurate accounts of all transactions involved in any way in any claim for refund, for abatement, or for credit, and of processing exempt from tax.

(D) *Processors in class 2.*—Each processor in class 2, with respect to hog carcasses or other edible hog products received from a producer or feeder, and prepared for further distribution or use, shall report each such product so prepared in monthly return on P. T. Form 4B. Each such person who is also a processor of hogs in class 1 shall execute P. T. Form 4A and P. T. Form 4B in accordance with the instructions printed thereon and in accordance with these regulations. The total tax shown to be due on P. T. Form 4B shall be entered on line 11 of P. T. Form 4A and included with the total tax shown by that return to be due. The original and duplicate copies of P. T. Form 4B shall be securely attached to the respective original and duplicate copies of P. T. Form 4A and made a part of such return.

Each processor in class 2 shall keep a record showing for each calendar month (1) the date of receipt of the carcasses or other edible hog products from a

producer or feeder, (2) the name and address of the producer or feeder from whom such products were received, (3) an exact description of each such product conforming with the description thereof in paragraph E(3), above, and (4 the actual weight of each such product.

(E) *Processors in class 3.*—Each producer-processor or feeder-processor of hogs in class 3 who sells directly to, or exchanges directly with, consumers, carcasses or other edible hog products derived from hogs processed by him, or who shall sell, transfer, or exchange any such product (1) to any person engaged in reselling, rehandling, cutting, trimming, rendering, or otherwise preparing such products for market, or (2) to any restaurant, hotel, club, hospital, institution, or establishment of similar character, shall file for the month of November, 1934, and for each subsequent calendar month a return of such transactions on P. T. Form 4X in accordance with instructions printed thereon. Only such products sold directly to, or exchanged directly with, consumers by the producer or feeder shall be deemed to have been processed by the producer or feeder. See subdivision (F), below, and paragraph E(4), above, relative to exemption in the case of a producer-processor with respect to sales directly to, or exchanges directly with, consumers.

(F) *Exemption.—(a)* A producer who processes hogs *produced* by him and who, during any marketing year, sells directly to, or exchanges directly with, consumers not more than 300 pounds of the products derived therefrom, is exempt from processing tax on the live-weight equivalent thereof, computed in accordance with the conversion factors prescribed, as set forth below. This exemption is applicable only

with respect to hogs owned by the producer from the time they were farrowed. *A feeder-processor is not entitled to, and may not claim, any exemption* with respect to sales, transfers, or exchanges of hog products made by him.

(b) A producer who processes hogs produced by him and who, during any marketing year, sells directly to, or exchanges directly with, consumers, products derived therefrom in excess of 300 pounds but not in excess of 1,000 pounds shall be entitled to the exemption on 300 pounds of such products but shall pay the processing tax on the excess above 300 pounds. The processing tax on such excess shall be computed on a live-weight basis in accordance with the conversion factors hereinafter set forth.

(c) When two or more individuals produce a hog, the exemption as to 300 pounds shall be apportioned between the joint producers thereof on the basis of their respective shares.

(d) A producer who processes hogs produced by him and who sells directly to, or exchanges directly with, consumers during any marketing year more than 1,000 pounds of the products derived therefrom shall not be entitled to the above exemption of 300 pounds. When such total sales or exchanges first exceed 1,000 pounds, the producer becomes liable for the processing tax on the live-weight equivalent of all products derived from hogs processed, which were sold or exchanged by him since the beginning of the marketing year. The return of such producer-processor for the month in which such total sales or exchanges during the marketing year first exceed 1,000 pounds shall include the 300 pounds which would have been exempt except for such excess.

(e) For the purpose of determining the amount of tax to be paid, the producer shall use the conversion factors set forth below to restore to a live-weight basis the hog products sold or exchanged:

Article.	Conversion factor. Per cent.
Dressed carcass	132
Lard	110
All fresh, frozen, in cure, or barreled pork, dry salt cured pork	132
All pickle-cured pork	125
All smoked pork	140
All cooked, dried or canned pork	178

(f) Each producer or feeder shall keep a written record showing: (1) the date on which the hogs were slaughtered; (2) the number of hogs slaughtered; (3) the live weight of the hogs slaughtered (or if that is not practicable, an estimate of the live weight of the hogs and the basis used in arriving at this estimate); (4) the hog products sold or exchanged; (5) the weight thereof; (6) the date of the sale or exchange; (7) the name and address of the person to whom sold or exchanged, and if to persons other than consumers, the business of each such persons. Such record shall be retained on the premises of the producer, and shall be open for inspection by any internal revenue officer.

ART. 3. *Compensating tax on imported articles.*— A compensating tax became effective with respect to all articles processed or manufactured wholly or in chief value from hogs, and imported on and after November 5, 1933, into the United States or any possession thereof to which the Act applies, from any foreign country or from any possession of the

United States to which the Act does not apply. A compensating tax became effective with respect to articles processed wholly or partly from hogs, and imported after 11.23 a. m., May 9, 1934. The tax applicable to such articles is given in article 4 of these regulations. For detailed regulations as to this tax consult Chapter IV of Regulations 81, as amended by Treasury Decision 4501, approved December 4, 1934 [I. R. B. XIII-51, 21].

ART. 4. *Rates of tax or of refund with respect to articles processed from hogs.—(a)* Effective March 1, 1934, the rates of compensating tax or of refund, with respect to articles processed from hogs, are as follows:

(Rates of tax shown are cents per pound.)

Article.	Fresh, frozen, in cure, or barreled pork.	Cured.		Smoked	Cooked, dried, or canned
		Dry salt.	Pickle.		
Carcass:					
Head and leaf included	2.97	2.97	2.81	3.15	4.00
Head included, leaf removed	3.01	3.01	2.85	3.19	4.07
Head removed, leaf included	3.10	3.10	2.94	3.28	4.18
Head and leaf removed	3.12	3.12	2.97	3.30	4.23
Wiltshire side	3.26	3.26	3.10	3.46	4.41
Cumberland side	2.97	2.97	2.81	3.15	4.00
Regular ham	4.36	4.36	4.14	4.63	5.44
Skinned ham	4.92	4.92	4.61	5.15	6.57
Boneless ham	5.67	5.67	5.37	6.00	7.65
Rough shoulder	1.91	1.91	1.82	2.02	2.58
Regular shoulder	2.00	2.00	1.93	2.11	2.70
Skinned shoulder	2.11	2.11	2.00	2.25	2.85
Picnic	1.71	1.71	1.62	1.82	2.31
Boneless picnic	2.22	2.22	2.13	2.36	2.90
Shoulder butt and butt	2.76	2.76	2.61	2.92	3.73
Boneless butt	4.02	4.02	3.82	4.27	5.44
Rough short ribs, short ribs, extra short ribs, short clears, extra short clears, rib back	3.03	3.03	2.90	3.21	4.09
Pork loin	4.86	4.86	4.61	5.15	6.57
Fat back	1.95	1.95	1.86	2.07	2.63

(Rates of tax shown are cents per pound.)

Article.	Fresh, frozen, in cure, or barreled pork.	Cured.		Smoked	Cooked, dried, or canned
		Dry salt.	Pickle.		
Spareribs	1.48	1.48	1.41	1.57	2.00
Belly D. S. Trim	2.79	2.79	2.65	2.94	3.75
Belly S. P. trim and briskets	4.05	4.05	3.84	4.29	5.46
Plate, jowl, and trimmings	1.80	1.80	1.71	1.91	2.43
Head	1.35	1.35	1.30	1.41	1.82
Neck bones and feet	.42	.42	.40	.45	.58
Tails, livers, hearts, kidneys, and brains	.99	.99	.94	1.05	1.32
Snouts, ears, lips, and miscellaneous edible offal	.49	.49	.47	.51	.67
Cheek meat	1.98	1.98	1.89	2.11	2.65
Tongues	3.73	3.73	3.53	3.96	5.04
Lard	2.47	.....	.....	.....	.....
Pork sausage	1.80	1.80	1.71	1.91	2.52
Dried sausage (including cervelats and salamis)	1.35	1.35	1.28	1.43	1.89
Luncheon meats (including pork loaf, head cheese, souse, and sandwich meat)	1.71	1.71	1.62	1.83	2.39
Sausage, pork content[1]	1.80	1.80	1.71	1.91	2.52

[1] (1) If the taxpayer or person entitled to refund can show to the satisfaction of the Commissioner that any or all of the types of sausages processed wholly or in chief value from hogs, on which a tax is imposed, or which may be the subject of a claim for refund, which are included in the above list, contain more or less pork, green weight, than represented by the conversion factor prescribed therefor, then for each pound of pork, green weight, which said sausages are shown to contain, the rate of tax applicable in such case shall be the respective rate for pork sausage shown in the schedule above. The whole (actual) weight, as well as the total pork content, shall be reported.

(2) In the case of an edible product not named above, which (a) is wholly or partly of pork, and is subject to the payment of a compensating tax, or with respect to which a refund of tax is allowable upon exportation, or with respect to which a credit or refund of tax is allowable by reason of the delivery thereof for charitable distribution or use, or (b) is wholly or in chief value of pork, with respect to which a credit or refund of tax upon floor stocks is allowable, the amount of tax to be paid, or credit or refund to be allowed, shall be based upon the pork content thereof at the rate given above for each cut from which the pork contained in such product was derived. With respect to each such product there shall be entered on the claim (a) the whole (actual) weight, (b) the pork content, and (c) the rate of tax, corresponding with that shown for the cut in the schedule above.

(3) The establishment of the pork content of products as provided in (1) and (2), above, shall be substantiated by authentic records or other satisfactory proof.

ART. 5. *Forms.*—To insure the proper return of the taxes imposed by the Act, and to facilitate the collection and refund of taxes, certain forms have been prescribed for use by taxpayers. The prescribed form must be used as required by the applicable provisions of Regulations 81, or Regulations 83, September, 1934, edition, and must be carefully filled out in exact accordance with the applicable provisions of the proper regulations and the instructions contained on such form. The following forms with respect to hogs are hereby prescribed:

Form No.	Designation.	Required by—
P.T.Form 4A..	Return of processor of hogs —other than a producer or feeder who slaughters for market—class 1.	Article 2(*c*), above.
P.T.Form 4B..	Return of processor of hogs —class 2.	Article 2(*d*), above.
P.T.Form 4X, revised.	Return of producer-processor or feeder-processor of hogs —class 3.	Article 2(*e*), above.
P.T.Form 24..	Claim for refund of taxes illegally collected.	Regulations 81, article 31(*a*).
P.T.Form 24C	Claim for refund of, or credit for, tax paid with respect to articles delivered for charitable distribution or use.	Regulations 81, article 32, as amended.
P.T.Form 27..	Claim for refund of tax paid with respect to articles exported.	Regulations 83, revised.
P.T.Form 28..	Claim for credit, on return, of overpayment.	Regulations 81, article 31(*b*).

ART. 6. *Effective date.*—Treasury Decision 4425, approved March 20, 1934 [C. B. XIII-1, 459], shall remain in force and effect in so far as it relates to liability for tax incurred and refund accrued prior to November 1, 1934, except that it shall not remain in force and effect in so far as it relates to compensating tax incurred and refund of compensating tax and export refund accrued after 11.23 a. m., eastern standard time, May 9, 1934. These regulations shall be in force and effect as of the earliest moment of November 1, 1934, except that they shall be in force and effect as of 11.23 a. m., eastern standard time, May 9, 1934, in so far as they relate to liability for compensating tax incurred and to refund of compensating tax and export refund accrued after that time.

CHAS. T. RUSSELL,
Acting Commissioner of Internal Revenue.

Approved January 25, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.